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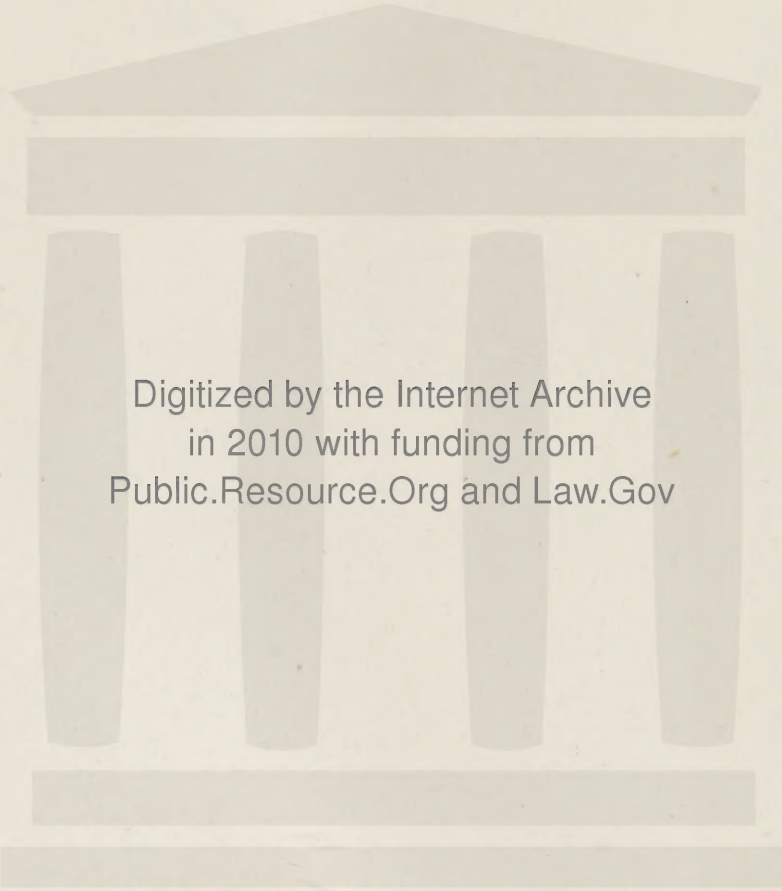
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No. 2689

United States
Circuit Court of Appeals
For the Ninth Circuit.

ONERATO CHAPPI, Owner of the Gasoline Boat
"NOE G,"

Appellant,

vs.

M. COSTA, JOE H. COSTA AND JOHN SILVA,
Appellees.

Apostles on Appeal.

Upon Appeal from the United States District Court for
the Southern District of California,
Southern Division.

Filed

JAN 26 1916

F. D. Monckton,

United States
Circuit Court of Appeals
For the Ninth Circuit.

ONERATO CHAPPI, Owner of the Gasoline Boat
"NOE G,"

Appellant,

vs.

M. COSTA, JOE H. COSTA AND JOHN SILVA,
Appellees.

Apostles on Appeal.

Upon Appeal from the United States District Court for
the Southern District of California,
Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

For Appellant:

CLAUDE C. CHAMBERS, Esq., San Diego,
California.

For Appellees:

Messrs. MARKS P. MOSSHOLDER and C. G.
SELLECK, San Diego, California. [3*]

*In the District Court of the United States, in and
for the Southern District of California, Southern
Division.*

No. 367—CIVIL—S. D.

M. COSTA, JOE H. COSTA and JOHN SILVA,
Libelants,

vs.

Gasoline Power Boat, "NOE G," ONIRATO
CHAPPI, Claimant,
Respondents. [4]

NO. 367—CIVIL.

*In the District Court of the United States, in and
for the Southern District of California, South-
ern Division.*

M. COSTA, JOE H. COSTA and JOHN SILVA,
Libelants,

vs.

Gasoline Power Boat, "NOE G," ONIRATO
CHAPPI, Claimant,
Respondents.

*Page-number appearing at foot of page of original certified Apostles
on Appeal.

Statement.

February 10, 1915: Verified libel was filed and monition issued to the United States Marshal for the Southern District of California.

NAMES OF ORIGINAL PARTIES TO THE ACTION.

Libelants: M. Costa, Joe H. Costa and John Silva.

Respondents: Gasoline Power Boat "Noe G."

Claimant: Onirato Chappi, sole and separate owner of Gasoline Power Boat, "Noe G."

DATES OF THE FILING OF THE PLEADINGS.

February 10, 1915: Filed verified libel.

February 20, 1915: Filed affidavit of ownership.

February 26, 1915: Filed answer of owner and claimant to the libel. [5]

(Statement, Continued.)

ATTACHMENT OF PROPERTY AND PROCEEDINGS THEREUNDER.

February 10, 1915. A motion issued and delivered to the United States Marshal for the Southern District of California.

Said monition afterwards returned into court, with the following return of the United States Marshal:

"In obedience to the within monition, I attached the gasoline boat 'Noe G,' therein described, on the 16th day of February, 1915, and have given due notice to all persons claiming the same, that this Court will, on the first day of March, 1915, (if that day should be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to the trial

and condemnation thereof, should no claim be interposed for the same.

C. T. WALTON,

U. S. Marshal.

By F. G. Thompson,

Deputy.

Dated February 20th, 1915."

February 20, 1915: Affidavit of ownership filed by Onirato Chappi, together with an undertaking for release, in the sum of \$2,500, which amount was fixed by stipulation between the proctors for the respective parties.

April 5, 1915: The above-entitled cause came on to be heard on this day, and was heard on this day, and the following 6th day of April, 1915, in the District Court of the United States for the Southern District of California, Southern Division, at the city of San Diego, California, before the Honorable Oscar A. Trippet, Judge of said court. [6]

(Statement Continued.)

April 30, 1915: Filed findings of fact and conclusions of law. Filed Decree.

May 8, 1915: Notice of appeal in the above-entitled cause, by Onirato Chappi, was this day filed. [7]

In the District Court of the United States of America,
in and for the Southern District of California,
M. COSTA, JOE H. COSTA, and JOHN SILVA,
Libelants,

vs.

Gasoline Power Boat "NOE G."

Libel.

The Libel and Complaint of M. Costa, Joe H. Costa, and John Silva, owners of the gasoline power boat, "L'Etruria," on their behalf, against the power boat "Noe G," her engines, tackle, apparel and furniture, and against all persons intervening for their interest therein, in a cause of collision, civil and maritime, allege as follows:

1st.

That, at all the times herein mentioned, the above-named libelants were residents of the city of San Diego, county of San Diego, State of California, and were the owners of the gasoline power boat, "L'Etruria."

2d.

That the gasoline power boat "Noe G" herein proceeded against, is now within the Port of San Diego, and within the jurisdiction of this Court.

3d.

That on Tuesday, the 3d day of November, A. D. 1914, at 7:45. A. M., a collision occurred between the said power boats "L'Etruria" and "Noe G," between Santa Tomas and China Points, off the coast of Baja California, Mexico, and outside [8] of the three-mile limit; by reason of which said gasoline power boat "L'Etruria" was sunk, together with her engines, tackle, apparel, furniture and provisions, and the effects of her owners were lost as hereinafter set forth.

4th.

That on the day above named, the said gasoline power boat "L'Etruria" was proceeding in a south-

erly direction off the coasts of Baja California, Mexico, bound on a fishing voyage, at about 7:45 o'clock in the morning, in foggy weather; that her crew were properly disposed and employed in their respective duties, and were faithfully attending thereto, with the helm and lookout properly and competently manned.

That at about this time, she made out directly ahead and within a few yards of her, a vessel which afterwards proved to be the said gasoline power boat "Noe G"; that the "L'Etruria" immediately altered her course to starboard, in accordance with the rules of the road; that the said gasoline power boat "Noe G," immediately thereafter altered her course to port, without making any signal, in such a manner that she almost immediately thereafter collided with the power boat "L'Etruria," striking the "L'Etruria" about two feet forward of the chain-plates on the port bow, breaking her timbers and opening up her seams, so that she began to make water so rapidly that it became necessary for the mariners of the "L'Etruria" to leave her, which they at once did. That within five minutes after the said collision, the said "L'Etruria" was sunk in about ninety fathoms of water.

5th.

That the said libellants allege that the collision was in no way due to any fault on the part of the "L'Etruria," which was in all respects carefully managed, but was due to the fault [9] on the part of the "Noe G," in that she did not alter her course to starboard instead of to port, as under the rules

of the road she should have done, and in that she was in other respects improperly and carelessly navigated.

6th.

The libellants further allege that, by reason of said collision, they have suffered damage, through the loss of the said "L'Etruria," her engines, tackle, apparel and furniture, and the loss of her stores, ammunitions and the effects of the owners on board, which were lost, in the sum of twenty-eight hundred and fifty o/c dollars.

All and singular the premises are true and within the admiralty and maritime jurisdiction of this court.

WHEREFORE the libellants pray that process in due form of law, and according to the practice of this Honorable Court may issue against the said vessel "Noe G," her engines, tackle, apparel and furniture, and that she may be condemned and sold to answer for the damages alleged in this libel, and that this Court will hear the evidence, which the libellants will adduce in support of the allegations of the libel, and will enter a decree in favor of the libellants for the above-mentioned damages; and will order the same to be paid out of the proceeds of the vessel "Noe G," together with interest, and the costs of the libellants; and will otherwise rightly and justly administer in the premises.

C. G. SELLECK and
W. J. MOSSHOLDER,
MARKS P. MOSSHOLDER and
RUSK P. MOSSHOLDER,

Proctors for Libelants. [10]

State of California,
County of San Diego,—ss.

John Silva, being first duly sworn, deposes and says: That he is one of the libellants above named; that he has heard read the foregoing libel and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged, on information and belief, and as to those matters, that he believes it to be true.

JOHN SILVA.

Subscribed and sworn to before me, this 8th day of February, A. D. 1915.

[Seal] MARKS P. MOSSHOLDER,
Notary Public in and for the County of San Diego,
State of California.

[Endorsed]: 367—Civil. In the District Court of the United States of America, in and for the Southern District of California. M. Costa, Joe H. Costa, and John Silva, Libellants, vs. Gasoline Power Boat “Noe G.” Libel. Filed Feb. 10, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Marks P. Mossholder and C. G. Selleck, Room 5, 1st Natl. Bank Bldg., San Diego, California, Proctors for Libellants. [11]

*In the District Court of the United States of America,
in and for the Southern District of California,
Southern Division.*

CIVIL No. ——. IN ADMIRALTY.

M. COSTA, JOE H. COSTA, and JOHN SILVA,
Libelants,

vs.

Gasoline Power Boat "NOE G."

Libellee.

Affidavit of Ownership.

State of California,

County of San Diego,—ss.

Onirato Chappi of the city of San Diego, county of San Diego, State of California, being first duly sworn, deposes and says: That he is the sole and separate owner of that certain gasoline power boat known and designated as "Noe G," her engines, tackle, apparel and furniture of any and every nature used in connection with said power boat.

ONIRATO CHIAPPI.

Subscribed and sworn to before me this 19th day of February, 1915.

[Seal]

CLAUDE L. CHAMBERS,
Notary Public in and for the County of San Diego,
State of California.

[Endorsed]: Original. Civil. No. 367—Civ. In Admiralty. In the District Court of the United States of America, in and for the Southern District of California, Southern Division. M. Costa et al., Libellants, vs. Gasoline Power Boat "Noe G,"

Libellee. Affidavit of Ownership. Filed Feb. 20, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Crouch and Chambers. [12]

*In the District Court of the United States of America,
in and for the Southern District of California,
Southern Division.*

CIVIL No. ——. IN ADMIRALTY.

M. COSTA, JOE H. COSTA, and JOHN SILVA,
Libelants,

vs.

Gasoline Power Boat "NOE G."

Libellee.

Answer.

Comes now Onirato Chappi, the owner of the gasoline power boat "Noe G," and for answer to libellants' libel and complaint, admits, denies and alleges as follows:

I.

Admits that at all times herein mentioned, the above-named libellants were residents of the city of San Diego, County of San Diego, State of California, and were the owners of the gasoline power boat "El Etruria."

II.

Admits that the gasoline power boat "Noe G" herein proceeded against, is now within the Port of San Diego, and within the jurisdiction of this Court.

III.

Admits that on Tuesday, the 3d day of November, A. D., 1914, at about 7:45 A. M., a collision occurred

between the said power boats "El Etruria" and the "Noe G," between Santa Tomas and China Points off the coasts of Baja California, Mexico. Denies that said collision occurred outside of the three-mile limit, and alleges the fact to be that said collision occurred at one and one-half miles from the coast of [13] Baja California, Mexico. Admits that the "El Etruria" was sunk, but denies that her tackle, apparel, furniture and provisions were lost as hereinafter set forth, and alleges the fact to be that the nets belonging on said boat were saved.

IV.

Admits that on the day above named, the said gasoline power boat "El Etruria" was proceeding in a southerly direction off the coast of Beja, California, Mexico, bound on a fishing voyage at about 7:45 o'clock in the morning. Admits that the weather was foggy. Denies that her crew were properly disposed and employed in their respective duties and were faithfully attending thereto with the helm and lookout properly and competently manned, and alleges the fact to be that her crew were not disposed and employed in their respective duties and were not faithfully attending thereto. That none of the crew of the "El Etruria" were on deck and in charge of the helm and lookout. That the helm was without anyone in charge and no one was on the lookout attending to the duties necessarily incident thereto. Denies that at about this time the "El Etruria" made out directly ahead and within a few yards of her a vessel which afterwards proved to be the said gasoline power boat "Noe G." Denies that the "El

Etruria" immediately altered her course to starboard or altered her course at all in accordance with the rules of the road. Denies that the "Noe G" immediately thereafter altered her course to port without making any signal in such a manner that she almost immediately thereafter collided with the "El Etruria," striking the "El Etruria" about two (2) feet forward of the chain plates on the port bow, breaking her timbers and opening up her seams so that she began to take water so [14] rapidly that it became necessary for the mariners of the "El Etruria" to leave her, which they did do. Denies that within five (5) minutes after said collision, the said "El Etruria" was sunk in about ninety (90) fathoms of water, but alleges the fact to be that the crew of the "Noe G" immediately after discovering the "El Etruria" caused their engines to be reversed and made every attempt possible to avoid a collision, and alleges further that had the crew of the "El Etruria" been faithfully attending to their duties aboard said boat, that no accident would have occurred. Further alleges that immediately after said collision, the crew of the "Noe G" proceeded to take on board the crew of the "El Etruria" and assisted them in taking on board the "Noe G" the nets belonging on the "El Etruria," fastened a line to said "El Etruria," and attempted to tow the said "El Etruria" into port; but owing to the heavy seas they were unable to do so and about an hour and thirty minutes after said collision, the "El Etruria" was sunk.

V.

Denies that the said collision was in no way due to any fault on the part of the "El Etruria." Denies that the said "El Etruria" was carefully managed. Denies that the accident was due to the fault or carelessness on the part of the "Noe G" in that she did not alter her course instead of to port as under the rules of the road she should have done. Denies that she was in other respects, or in any respects, improperly or carelessly navigated and alleges the fact to be that the collision was due to the fault, carelessness and neglect of the crew of the "El Etruria" in not having said crew properly disposed and at their various and respective places of duty; and that the accident was entirely due to the carelessness and negligence on the part of [15] the crew of the "El Etruria" and in no way the fault of the crew of the "Noe G."

VI.

Denies that libellants, by reason of said collision, have suffered damages through the loss of the said "El Etruria," her engines, tackle, apparel and furniture and the loss of her stores, merchandise and effects of the owners which were lost in the sum of Twenty-eight Hundred Fifty Dollars.

And further answering the libel and complaint, alleges the fact to be that the "Noe G" was damaged by said collision due to the fault, carelessness and negligence of the libellants herein as follows, to wit:

Breaking of bow plate of the value of Ten Dollars (\$10.) All and singular the premises are directly and within the admiralty and maritime jurisdiction of this Court.

WHEREFORE, the libellee herein prays that the libellants take nothing by their said action herein, and that this Court will hear the evidence that the libellee will introduce in support of the allegations of his answer, and will enter a decree in favor of the libellee for the above-mentioned damages and for costs herein expended, and will otherwise rightly and justly administer in the premises.

CROUCH & CHAMBERS,
By CLAUDE L. CHAMBERS,
Proctors for Libellee. [16]

State of California,
County of San Diego,—ss.

Onirato Chappi, being first duly sworn, deposes and says:—That he is the owner and libellee above named; that he has heard read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, that he believes it to be true.

ONIRATO CHIAPPI.

Subscribed and sworn to before me this 19th day of February, 1915.

[Seal] CLAUDE L. CHAMBERS,
Notary Public in and for the County of San Diego,
State of California.

[Endorsed]: Original. Civil No. 367—*Civ.* in Admiralty. In the District Court of the United States of America, in and for the Southern District of California, Southern Division. *M. Costa, et al*, Libellants, vs. *Gasoline Power Boat, "Noe G,"* Libellee.

Answer. Filed Feb. 26, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Rec'd copy of within answer this 25th day of February, 1915. C. G. Selleck, Marks P. Mossholder, Crouch and Chambers, Proctors for Libellee. [17]

[Order that Libel be Amended and that Cause be put on Calendar.]

At a stated term, to wit, the January term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the first day of March, in the year of our Lord, one thousand nine hundred and fifteen. Present: the Honorable BENJAMIN F. BLEDSOE, District Judge.

No. 367—Civil S. D.

M. COSTA et al.,

Libellants,

vs.

Gasoline Power Boat "NOE G," ETC.,

Respondents.

The U. S. marshal for this District having made return herein of process heretofore issued, and this being the return day thereunder, the usual proclamation in admiralty is thereupon made by said U. S. marshal; and it is ordered, pursuant to the stipulation of the parties to this cause, by their advocates of record, on file herein, that the libel in this cause be amended by inserting, in line 3 of page 3 thereof,

after the words, "in the sum of," the following words, to wit, "twenty-eight hundred and fifty," said amendment to be made by the clerk and attested by him with a reference to this order; whereupon, pursuant to the stipulation of the parties hereto, by their advocates of record, on file herein, it is ordered that this cause be put upon the calendar of this court for Monday, the 8th day of March, 1915, to be called at San Diego, California, for the setting of said cause down for final hearing.

[Endorsed]: No. 367—Civil. United States District Court, Southern District of California, Southern Division. *M. Costa, et al., Libellants, vs. Gasoline Power Boat 'Noe G,' etc., Respondents.* Copy minute order amending libel. [18]

At a stated term of the District Court of the United States for the Southern District of California, held at the court-room in the Federal Building in the City of San Diego, County of San Diego, State of California, on the 6th day of April, A. D. 1915. Present: Honorable OSCAR A. TRIPPET.

M. COSTA, JOE H. COSTA, and JOHN SILVA,
Libellants,

vs.

The Gasoline Power Boat, "NOE G."

Findings of Fact and Conclusions of Law.

THIS CAUSE CAME ON REGULARLY to be heard on the 6th day of April, A. D. 1915, Marks P. Mossholder and C. G. Selleck appearing as attorneys

for libellants, and Messrs. Crouch and Chambers appearing as attorneys for claimants herein: and the said cause having been presented before the Court without a jury, and evidence both oral and documentary having been introduced herein on behalf of said respective parties; and said cause having been submitted to the Court for decision; and said Court having duly considered the same, finds the following facts, to wit:

1st.

That the gasoline power boat, "Noe G" was the property of the claimant Onirito Chappi on the 3d day of November, 1914.

2d.

That the gasoline power boat "L'Etruria" was owned by the Libellants, M. Costa, Joe H. Costa, and John Silva.

3d.

That on the 3d day of November, A. D. 1914, at about seven, forty-five o'clock A. M. the said defendants, the gasoline power boat, "Noe G" collided with the gasoline power boat "L'Etruria" off the coast of Baja California, Mexico, between Santa Tomas and China Point, off said coast. [19]

4th.

That at the time of said collision, and for some time prior thereto, the said boats had been running in a fog; that at the time of the collision, and for some time prior thereto, the gasoline power boat, "L'Etruria" had not been blowing her fog-horn; that the lookout on the "L'Etruria" sighted the "Noe G" when the two boats were from forty to

fifty feet apart; that the said "Noe G" was dead ahead of and on a course bearing directly toward the "L'Etruria"; that at the time the lookout on the "L'Etruria" sighted the "Noe G," he immediately ported his helm and went to starboard.

5th.

That the "Noe G" did not sight the "L'Etruria" until she was within from ten to fifteen feet of the said "L'Etruria"; that had the lookout been properly manned and attending to his duties, he could have made the "L'Etruria" when she was at least forty to fifty feet distant; that the said Noe G. held her course and did not go to starboard after sighting the "L'Etruria," striking the "L'Etruria" on her port bow just forward of the chain-plates, breaking a large hole in said "L'Etruria," through which the sea entered so rapidly that within a few minutes after the collision, the said "L'Etruria" sank, together with her engines, tackle, apparel, furniture and provisions; that the gasoline power boat "L'Etruria," her engines, tackle, apparel, furniture and provisions were lost; that the said libellants were damaged, through the loss of the "L'Etruria," her engines, tackle, apparel, furniture, and provisions in the sum of twenty-five hundred dollars; that the "Noe G" was not damaged. [20]

[Conclusions of Law.]

CONCLUSIONS OF LAW FROM THE FOREGOING FACTS.

The Court finds:

1st.

That the "L'Etruria" was negligent in not blow-

ing her fog-horn, prior to the collision.

2d.

That the "Noe G" was negligent in not keeping a proper and sufficient lookout, and in not going to starboard when she sighted the "L'Etruria."

3d.

That the damages to the "L'Etruria," her engine, tackle, apparel, furniture and provisions should be born equally by the libellants and claimant.

4th.

That the libellants are entitled to recover from the claimant, *Onirite* Chappi, one-half of the damage suffered by the said libellants, to wit, the sum of twelve hundred and fifty dollars.

5th.

That each party pay the costs by said party incurred.

Dated this 30th day of April, A. D. 1915.

OSCAR A. TRIPPET,

Judge.

[Endorsed]: 367-Civil. In the District Court of the United States, in and for the Southern District of California. M. Costa, Joe H. Costa, and John Silva, Libellants, vs. The Gasoline Power Boat, "Noe G." Findings of Fact and Conclusions of Law. Rec'd Copy of within Findings, this 23 day of April, 1915, Crouch & Chambers. Filed Apr. 30, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy. Marks P. Mossholder, and C. G. Selleck, Attorneys for Libellants, Room 5, 1st Natl Bank Bldg., San Diego, Calif. [21]

At a stated term of the District Court of the United States, for the Southern District of California, held at the courtroom in the Federal Building, in the City of San Diego, County of San Diego, State of California, on the 6th day of April, A. D. 1915. Present: Honorable OSCAR A. TRIPPET.

M. COSTA, JOE H. COSTA, and JOHN SILVA,
Libellants,

vs.

The Gasoline Power Boat, "NOE G."

Final Decree.

THIS CAUSE HAVING BEEN HEARD on the pleadings and proofs, and having been argued and submitted by the advocates of the respective parties, and due deliberation having been had;

IT IS ORDAINED, ADJUDGED AND DECREED by the Court that the libellants recover from the claimant the sum of Twelve Hundred Fifty Dollars, and that each party pay the costs by said party incurred.

DATED this 30th day of April, A. D. 1915.

OSCAR A. TRIPPET,

Judge.

Decree entered April 30, 1915.

WM. M. VAN DYKE,

Clerk.

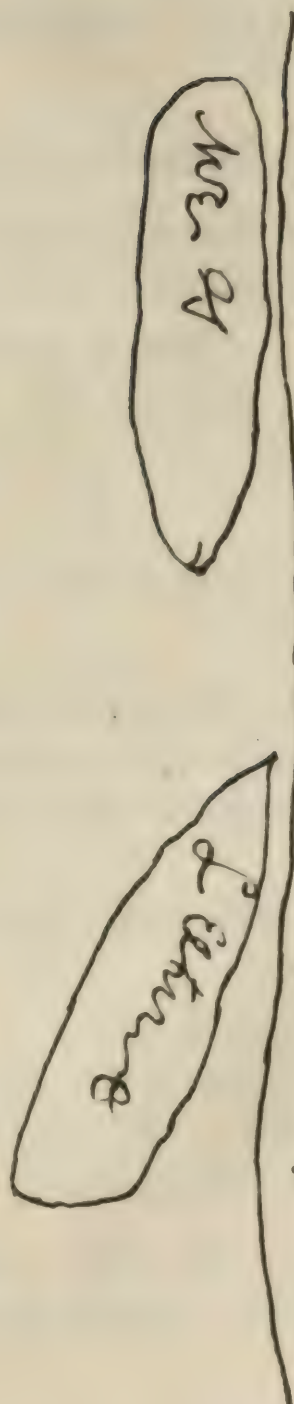
By Leslie S. Colyer,

Deputy Clerk.

[Endorsed]: 367-Civ. In the District Court of the United States, in and for the Southern District

of California. M. Costa, Joe H. Costa, and John Silva, Libellants, vs. The Gasoline Power Boat, "Noe G," Final Decree. Filed Apr. 30, 1915, Wm M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy. Rec'd copy of within decree this 21st day of April, 1915. Crouch & Chambers. By Chambers. Marks P. Mossholder and C. G. Selleck, Attorneys for Libellants, Room 5, 1st Nat'l. Bank Bldg., San Diego, Calif. [22]

[Exhibit "A"]



40 ft

[Endorsed]: 367-Civ. *N. Costa et al. vs. Gasoline Power Boat "Noe G"* Court's Exhibit "A." Filed Apr. 5, 1915. Wm. M. Van Dyke, Clerk. By T. F. Green, Deputy Clerk. [23]

[Transcript of Testimony.]

In the District Court of the United States, Southern District of California, Southern Division.

No. 367-CIVIL.

N. COSTA et al.,

Libellants,

vs.

Gasoline Power Boat, "NOE G."

Respondent.

San Diego, Cal., May 27, 1915.

It is hereby stipulated and agreed that this is a true and correct transcript of the testimony in the above-entitled cause.

MARKS P. MOSSHOLDER and

C. G. SELLECK,

Attorneys for Libellant.

CROUCH & CHAMBERS,

By CLAUDE L. CHAMBERS,

Attorneys for Respondent.

Filed June 1, 1915. Wm. M. Van Dyke, Clerk.
By Chas. N. Williams, Deputy Clerk. [24]

*In the District Court of the United States, Southern
District of California, Southern Division.*

N. COSTA et al.,

Libellants,

vs.

Gasoline Power Boat, “NOE G.”

Respondent.

San Diego, Cal., April 6th, 1915.
C. G. SELLECK, Proctor for Libellants.
CROUCH & CHAMBERS, Proctors for Re-
spondent.

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[25]

L. OLIVER, sworn as interpreter, to interpret from Portuguese into English and English into Portuguese.

[Testimony of J. H. Costa, for Libellant.]

J. H. COSTA, called, sworn and examined on behalf of libellants, testified as follows:

Direct examination.

(By Mr. SELLECK.)

Q. What is your name? A. J. H. Costa.

(Testimony of J. H. Costa.)

Q. Where do you reside? A. San Diego.

Q. You are one of the owners of the gasoline power boat, "Letruria"? A. Yes, sir.

Q. You were on the "Letruria" on the morning of Tuesday, November 3d, 1914? A. Yes, sir.

Q. Where was the "Letruria" about 7:45 of that morning? A. Right below San Tomas.

Q. Off the Coast of Lower California?

A. Yes, sir, on the Mexican Coast.

Q. Who was on the "Letruria" besides yourself?

A. My brother, N. H. Costa and my partner John T. Silva.

Q. Who had charge of the boat at that time?

A. I was.

Q. What were you doing?

A. He says he was at the rudder.

Q. Where was N. Costa and John Silva?

A. They were down below lying down. [26]

Q. At about that time did the "Letruria" have a collision with any other boat?

The COURT.—That is admitted.

Q. About what time was it you first saw the "Noe G" on the morning of February 3d?

A. It was near eight o'clock, as near as I can remember.

Q. Where was the "Noe G" with reference to the "Letruria"?

A. He said he was going towards southeast, and the "Noe G" was coming towards the opposite way, towards Ensenada.

Q. Where was the "Noe G" with reference to the

(Testimony of J. H. Costa.)

“Letruria,” in front or one side?

A. He says it was coming right straight for him.

Q. How far apart were they when he saw it?

A. About 50 feet.

The COURT.—Was there a dense fog at that time?

A. Yes, sir.

Q. Did they have any lights, either boats?

A. It was daylight, but the lights were lit yet.

Q. Was there anybody else on deck, but him?

A. He was alone.

Q. When you first saw the “Noe G” what did you do, if anything?

A. I tried to turn to the right, the right-hand side.

Q. How far to the right did you turn? What is the trouble?

A. He says he was going south. I am trying to ask him what distance when he saw the “Noe G” what distance he went out of his course and he says he went south.

Q. Ask him how much to the right he went, not out of his course, but how much to the right he went?

A. He says at least 15 feet.

The COURT.—Went to the right 15 feet before he struck? A. He says about that. [27]

The COURT.—And what was aboard the “Letruria”?

A. He said there was ice and oil and provisions and clothing.

Q. Any nets aboard, after those six were taken off?

(Testimony of J. H. Costa.)

The COURT.—The things that went down with the ship.

A. Sixteen pieces of net.

Q. Went down with the ship?

A. Went down with the ship. He said he had eight and fourteen and six of them were saved, and sixteen must have been sunk.

Q. Do you know what the value of those nets was?

A. About \$300.

Q. What was the value of the ice?

A. About \$9.00 worth of ice.

Q. How about provisions? A. \$9.00.

Q. How about the clothing and wearing apparel?

A. He says his clothes were worth about \$25.

Q. What was the value of the oil?

A. He says he had 300 gallons.

The COURT.—You mean gasoline or oil?

A. Distillate, seven and a half a gallon. He said, six and a half or seven and a half, he isn't quite sure.

Q. Ask him if he knows what the value of the "Letruria" was at that time. A. \$2,700.

Q. What was the beam of the "Letruria," how wide?

A. She was 38 feet in the beam, and ten foot four wide.

Q. 38 feet long?

A. 38 feet on beam and ten foot four inches wide.

Q. What was the duct of her from the keel to the deck line?

A. He says he doesn't know, about four feet.

Q. What kind of an engine was in it? [28]

(Testimony of J. H. Costa.)

The COURT.—That is, he went 15 feet out of the course, is that what he means?

A. Yes, sir, he saw the boat and turned the rudder and he turned about 15 feet out of his course.

Q. Ask him if he put the wheel hard down and went to the starboard as far as he could.

Mr. CHAMBERS.—I object as leading.

The COURT.—That is all right, ask him the question.

A. Yes, he says he tried his best.

Q. Ask him whether or not he gave any signal.

A. He says he gave no signal, he had no time.

The COURT.—What did he have on the boat to give a signal with?

A. He said he had a whistle.

The COURT.—Couldn't he reach a whistle at the same time he put the helm over?

A. He says he couldn't.

Q. Was the whistle connected with the engine or a hand whistle blown by mouth?

A. He says he has both.

Q. Was the engine whistle connected up so he could do that?

A. Yes, sir, it was connected up.

Q. How far was it to reach for that engine cord or whistle?

A. He says he has to get out of the pilot-house to blow the whistle, that is all the time it takes.

Q. Ask him if he was keeping a close look out ahead before the accident.

A. Yes, sir.

(Testimony of J. H. Costa.)

The COURT.—I don't understand that. Could he handle the helm, put the helm over and blow the whistle at the same time, [29] whether it was so constructed that he could reach the whistle, blow the whistle, and throw the helm over?

INTERPRETER.—Without leaving the helm?

The COURT.—Without leaving the helm.

A. He said he could not.

The COURT.—How far was the whistle away from the helm?

A. About four feet.

The COURT.—So in order to blow the whistle, he had to leave the helm?

A. Yes, sir, so he says.

Q. Did he have a hand whistle in with him, right alongside of him, in the pilot-house?

A. He says, yes, sir, he had it right alongside of him, but he didn't blow it, because he gave all his attention to the helm.

Q. Ask him if he used both hands to throw that wheel hard down.

A. He could do better with both hands.

The COURT.—How long did it take him to turn the wheel over hard aport, how long did it take him to roll the wheel hard aport?

A. He says less than half a minute.

Q. How fast was the "Letruria" travelling?

A. He says about seven or seven and a half miles an hour.

Q. What is the speed of the "Letruria" when going full speed ahead?

(Testimony of J. H. Costa.)

A. About eight and three quarters.

Q. Did you hear any signal from the "Noe G"?

A. No, sir.

Q. Had you got the wheel hard aport before the "Noe G" struck the *Letruria*? [30]

A. Yes, sir.

Q. How long before?

A. About a half a minute or less.

Q. You say you didn't hear any signal at all?

A. No sir, no signal whatever.

Q. Did any of the men holler at you?

A. He says they hollered when they struck him.

Q. Did the "Noe G" alter her course?

A. She came right for him.

Q. Did she alter her course at all either way, before she struck him?

A. He says on the left-hand side about four feet from the bow.

Q. On the left-hand side about four feet from the bow. Perhaps we could agree on that.

Mr. CHAMBERS.—I can't agree where it was struck.

Q. About how far from the chain-plates was that, that she struck? A. About four feet.

Q. About four feet from the chain-plates or the bow?

A. It is about three feet or three and one-half feet.

The COURT.—That is three and a half feet from the bow?

A. Four feet from the bow, he said in the first place.

(Testimony of J. H. Costa.)

The COURT.—How long was the “*Letruria*?”

A. 38 feet.

Q. State to the Court what happened after the collision. Ask him whether or not there was anything saved off the “*Letruria*”?

A. Only six pieces of net that were floated on the top of the water after the “*Letruria*” was sunk.

The COURT.—The “*Letruria*” filled with water and sank by reason of the collision?

A. Yes, sir. [31]

A. Standard.

Q. What size? A. 40 horse-power.

Q. Two cylinders? A. Two cylinders.

Q. Ask him if he knows the price of a 20 horse-power standard engine? A. \$1,200.

Q. Ask him about how old the “*Letruria*” was.

A. About four years.

Cross-examination.

(By Mr. CHAMBERS.)

Q. I believe you stated you were the only man on the deck of the boat.

The COURT.—He claims he was the only man on deck.

Q. Ask him if he had been sounding this whistle or horn before this accident occurred. A. No, sir.

Q. Ask him if he had been making any kind of signal to attract the attention of other boats before this accident occurred. A. No, sir.

The COURT.—Just address your questions to the witness.

Q. Did you have a conversation with Mr. Verdugo,

(Testimony of J. H. Costa.)

the commander of the Port of Ensenada, the night after this accident occurred, in the morning?

A. He said he had no conversation with him, but his brother did.

The COURT.—With whom is this?

Mr. CHAMBERS.—A Mr. M. Verdugo, the commander of the Port of Ensenada. [32]

The COURT.—This is the plaintiff?

Mr. CHAMBERS.—One of the plaintiffs.

The COURT.—You can ask him directly any statement he made.

Q. Are you fishing and working for Mr. Brigante of this city? A. Yes, sir.

Q. Did you have any conversation with Mr. Brigante after this accident occurred, in which you stated to him how it occurred?

A. He said he had no conversation, but he asked him for money that he owed him from the trip before.

The COURT.—What do you claim that this witness said to that man?

Mr. CHAMBERS.—I don't know that I claimed this one did. It was one or the other, but I want to find out.

Q. You had no conversation with Mr. Brigante in which you discussed how this accident occurred at all?

A. He said he couldn't converse with him as he don't understand him.

Q. At the time this accident occurred, as a matter of fact you were all three down below on that boat, were you not?

(Testimony of J. H. Costa.)

A. He says no, sir, he was on deck.

Q. From whom did you purchase the “*Letruria*”?

A. He says he bought from S. Massa, his share.

Q. What did you pay for it?

A. \$1,350 for his share.

Q. What share did you have? A. One-half.

Mr. CHAMBERS.—That is all.

The COURT.—How long ago did you buy it?

A. Two years ago. [33]

Q. Did you go forward on the “*Letruria*” after the accident and before she sank?

A. Yes, sir; he says he walked over to tie a rope to try to tow it, but everything was broken and he couldn't tie it.

Q. You are sure she was struck on the port bow?

A. Yes, sir.

The COURT.—Why did he say he couldn't tie it?

A. It was broken.

The COURT.—What was broken, the ship?

A. The ship, the bow.

[Testimony of N. H. Costa, for Libellants.]

N. H. COSTA, called, sworn and examined on behalf of libellants, testified as follows:

Direct Examination.

(By Mr. SELLECK.)

(R. Oliver, interpreter.)

Q. What is your name? A. N. H. Costa.

Q. You are one of the owners of the power boat “*Letruria*”? A. Yes, sir.

Q. What share did you own? A. One-fourth.

Q. Were you on the “*Letruria*” on the morning

(Testimony of N. H. Costa.)

of November 3d, 1914? A. Yes, sir.

Q. At the time of this collision, where were you?

A. He was down below.

Q. Did you come on deck after the collision?

A. Yes, sir, after the boat struck him.

Q. At the time the boat struck, were you awake or asleep? A. He was asleep. [34]

Q. Where were you sleeping?

A. He says he was down in the bunk below.

Q. On which side of the boat?

A. On the right-hand side.

Q. The bow or stern of the boat? A. The bow.

Q. When did you wake up, if you know?

A. He says he woke when the boat struck him.

The COURT.—You did not translate the oath to him. Translate it to him now.

(Oath translated to witness by interpreter.)

Q. Did you see where the “Noe G” struck the “Letruria” while you were below, before you came on deck?

A. He said before he came up he saw the boat was broken from the rail to the keel.

Q. On which side of the boat?

A. The left-hand side.

Q. You came on deck immediately after you woke, did you?

A. Yes, sir, as soon as the boat struck he came to deck.

Q. Did you look at the place where the “Noe G” struck the “Letruria” again after you came on deck?

A. Yes, sir.

(Testimony of N. H. Costa.)

Q. Are you sure you were struck on the port side?

A. He says yes, sir, he was on the right-hand side and looked to his left and saw the boat broken.

Q. Ask him what was aboard the boat at the time it sank, aboard the "Letruria."

A. He says it was the nets and the clothes and oil and ice, and \$104.85 in his clothes.

The COURT.—The clothes amounted to \$104.

A. The money he had in his clothes. [35]

The COURT.—And the clothes how much?

A. He says the clothes were only worth about \$10.

The COURT.—And how much money?

A. \$104.85.

Q. What else did he have personally?

A. Just the nets and the ice and the oil.

The COURT.—How much were the nets worth?

A. About \$300, the nets.

The COURT.—And ice?

A. Ice, \$9.00, and the oil, he said there was 300 gallons, he didn't know just exactly what it cost him.

Q. Ask him if he doesn't know what he paid for that before he went out?

A. He says he paid the bill, but he paid other bills together with it, and don't remember just exactly.

The COURT.—How much were the provisions?

A. About \$8 or \$9.

Q. Do you know what the value of the "Letruria" was at that time? A. He says \$2,700, \$2,750.

The COURT.—What did they pay for it?

A. He says he just bought it at that time and he paid \$1,350 for it.

(Testimony of N. H. Costa.)

Q. How long did he have it when she sank?

A. He said he had had it two months when it sank.

Q. The other fellow said he had had it two years.

A. This fellow bought his share along afterwards.

The COURT.—He bought his two months, and the other man is supposed to have had his two years. Who did he get his half from?

A. He just bought one-fourth of the boat when he bought his two months before the “Letruria” sank. There was a half [36] sold for \$1,350, but he just purchased one-fourth.

Cross-examination.

(By Mr. CHAMBERS.)

Q. How much ice did you have on that boat?

A. He says ten blocks.

Q. How much did it cost you a block?

A. \$.90 a block.

Q. When did you buy it?

A. He says about the 2d of the month, the day before he left.

Q. How much oil did you buy? A. 300 gallons.

Q. How much of it had you used?

A. About 60 gallons.

Q. Bought 300 gallons when you left San Diego?

A. Yes, sir.

Q. And had used 60 gallons?

A. He says he used about 60 gallons until he lost the boat.

Q. How much did you have on it at the time the boat went *on*?

A. He says he don't know just exactly, but he went

(Testimony of N. H. Costa.)

from here down to San Midas, and as much as he knows he used about 60 gallons, and the rest was on the boat.

Q. You started out with 300 gallons, did you?

A. Yes, sir.

Q. Then, at the time the boat went down you would have had 240 gallons of oil on the boat?

A. He said more or less, he couldn't measure it.

Q. What provisions did you have on the boat?

A. He said he had milk and bread and meat and beans.

The COURT.—Coffee?

A. Coffee and sugar. [37]

Q. Did you purchase those provisions in San Diego? A. Yes, sir.

Q. What did you pay for the provisions in San Diego?

A. He says he purchased some of those provisions at Point Loma and some at *Boseville* across the bay, and he had other bills, that he paid them altogether, and don't know just exactly what he paid for them, but as near as he could figure it, it was \$9.00.

Q. \$9.00 worth of provisions he started out with?

A. Yes, sir.

Q. Had he used any of those provisions?

A. No, sir, he hadn't used any yet.

The COURT.—Where had he been to use 60 gallons of distillate, had he made any other trip between the time he got this 300 gallons of distillate, and prior to the collision?

A. They couldn't have used 60 gallons of distillate

(Testimony of N. H. Costa.)

going from here down there?

A. He said more or less.

The COURT.—Had they made some other trip?

A. He says that he bought the oil just before he left, and a powerful boat that way uses that much, as near as he can figure it.

The COURT.—60 gallons in going down there?

A. That is what he says.

The COURT.—How long had he been away from the port here?

A. He says he left 9:30 in the evening and ran until near eight o'clock the next morning.

The COURT.—Don't he mean six gallons instead of 60?

A. He is positively sure, he said 60.

Q. Ask him if he knows Mr. M. Verdugo?

A. He says he don't know anybody by the name.

[38]

Q. Ask him if he knows the commandant of the Port of Ensenada, Mexico? A. Yes, sir.

Q. Did you have a conversation on the night after this accident occurred, with Mr. Verdugo, the commandant of the Port of Ensenada? A. Yes, sir.

Q. Ask him if he made this statement to Mr. Verdugo, that they were coming in with a very heavy fog, and they were going south and the "Noe G." was coming south, and on the "Letruria" they were down in the hold, in the cabin, and they were so close they didn't know what happened, they were all down in the hold.

A. He said that he told the commandant they were

(Testimony of N. H. Costa.)

going down and the "Noe G." was coming up in a heavy fog, and he says they called him out of the hold, he says they didn't call him out of the hold, he was the one that hollered for them to help him out of the hold.

Q. Did you tell Mr. Verdugo, the commandant of the Port of Mexico, you would not claim anything from the "Noe G." because it was your fault that the accident occurred?

A. He said that he didn't say that, that he was down in the hold and he couldn't say that the fault was his, that he was sound asleep when the accident occurred.

Q. Did you have a conversation with Mr. Brigante, the man you fish for as to how this accident occurred?

A. He said he spoke to him but he didn't discuss how the accident happened.

Q. Did you make this statement to Mr. Brigante, "My brother was lighting a cigarette, and he was down in the hold"? A. No, sir. [39]

Q. Did you make this statement, it was our fault, the way it happened? A. No, sir.

Q. Did you say to him that you wished you had sunk with the boat? A. No, sir.

Redirect Examination.

(By Mr. SELLECK.)

Q. Do you speak Italian?

A. No.

Q. Do you speak English? A. Very little.

Q. This Mr. Brigante speaks Portugese?

A. He says he don't know, he says he understands

(Testimony of N. H. Costa.)

between the two, he can't talk Italian, and he don't know if Mr. Brigante can talk Portuguese or not.

Cross-examination.

(By Mr. CHAMBERS.)

Q. Have you had conversations with Mr. Brigante and talked with him?

A. No, sir, he says he had had no conversation with Mr. Brigante, especially.

Q. You had talked with Mr. Brigante about other subjects, had you not?

A. You mean before that?

Q. Any time.

A. He says, yes, sir, he had conversed with him at times.

[Testimony of John T. Silva, for Libellants.]

JOHN T. SILVA, called, sworn, and examined on behalf of Libellants, testified as follows: [40]

Direct Examination.

(By Mr. SELLECK.)

(L. Oliver acting as interpreter.)

Q. What is your name?

A. J. T. Silva.

Q. You are one of the owners of the gasoline power boat "Letruria"? A. Yes, sir.

Q. What interest did you own?

A. One-fourth.

Q. Were you on the "Letruria" on the morning of November 3d, 1914? A. Yes, sir.

Q. Where were you at the time of the accident?

A. Down in the hold.

(Testimony of John T. Silva.)

Q. (The COURT.) Was he asleep?

A. Yes, sir.

The COURT.—What side of the boat was he on?

A. He says he was on the right-hand side.

Q. In the bow? A. Yes, sir.

Q. Did he wake up right after the accident, after the collision?

A. Yes, sir, he says he woke when they struck.

Q. Did he see where they struck? A. Yes, sir.

Q. Where?

A. He says on the left-hand side of the boat.

Q. Whereabouts on the left-hand side?

A. He says about four feet from the bow.

Q. Ask him what was aboard the “*Letruria*” at the time she sank?

A. Ice and oil and provisions, and nets and clothing.

Q. How much ice? A. Ten blocks. [41]

Q. What was it worth, what did it cost?

A. \$9.00 for the ice. \$9.00 worth of provisions, \$300 worth of nets. His own clothes about \$10.

A. Ask him if he knows how much oil there was aboard? A. 300 gallons.

Q. Was any oil aboard at the time that 300 gallons was put in, here in San Diego?

A. He says they had very little.

The COURT.—How much did they have in, when they sank?

A. About 240 gallons when they sank, they used about 60 gallons.

The COURT.—Used 60 gallons where?

(Testimony of John T. Silva.)

A. From here down.

Q. How much distillate does that boat use an hour?

A. He says to go full speed, easily use about three and a half or four gallons an hour.

Q. Do you know what the value of the "Letruria" was at the time?

A. He says he bought his share, and the price was \$2,700, at the rate of \$2,700.

The COURT.—A fourth? A. Yes, sir.

Mr. CHAMBERS: No cross-examination.

EMUEL SADA, sworn as interpreter, to interpret from English into Italian and Italian into English.

[Testimony of Oscar Peuna, for Respondents.]

OSCAR PEUNA, called, sworn and examined on behalf of respondents, testified as follows:

Direct Examination.

(By Mr. CHAMBERS.)

Q. State your name? [42]

A. Oscar Peuna.

Q. Were you on board the "Noe G" on November 3d when this accident occurred? A. Yes, sir.

Q. What position on the boat did you have at that time?

A. I was working for this boat.

Q. What were you doing at the time this accident occurred? A. I was cleaning fish.

Q. What part of the boat were you on?

A. I was a-starboard, on the right.

Q. What time of the day was it?

A. Fifteen minutes after seven.

(Testimony of Oscar Peuna.)

Q. What kind of morning was it?

A. Very foggy.

Q. Did you see the “*Letruria*” before the accident occurred.

A. No, I didn’t see the “*Letruria*.” I seen the “*Letruria*” when the trouble first started.

Q. What was the first thing you saw?

A. The first I seen the boat, I heard my Captain say, “There is a boat to our front.”

Q. How far away was the “*Letruria*” when you first saw it? A. About ten or fifteen feet.

The COURT.—Ten or fifteen feet?

A. When he saw it first.

The COURT.—Ten or fifteen feet apart?

A. Yes.

The COURT.—And who called his attention to it?

A. The man that was on watch.

The COURT.—What was his name?

A. Peo Pela. [43]

Q. What did he say?

A. “There is a boat in front of us, there is a boat in front of us.”

The COURT.—They were only about ten feet away then?

A. Yes, sir, about ten or fifteen feet apart.

Q. Which way was the “*Letruria*” headed?

A. The “*Letruria*” was going south.

Q. Did the “*Letruria*” change her course after you first saw her? A. No, sir.

Q. Did you see anybody on the “*Letruria*” at that time? A. I didn’t see nobody.

(Testimony of Oscar Peuna.)

Q. Did the “Noe G” have a whistle?

A. Yes, sir.

Q. Did she have a fog horn? A. Yes, sir.

Q. Do you know whether or not the *fog and* whistle had been blown before that time?

A. Yes, sir, we blew the whistle before getting together.

Q. How many times?

A. I couldn't say how many times, but we keep on blowing this whistle since we started up north.

The COURT.—When was the last time the whistle blew prior to the collision?

A. I blow the whistle before getting together.

Q. How long before they got together was the whistle blown? A. Less than half a minute.

Q. How long before the lookout told him there was a boat ahead, had they blown a whistle?

A. Just before, and in the meantime the lookout say, “There is a boat in front of us”! [44]

The COURT.—Just before?

A. Just before and at the time when the lookout say there was a boat in front of us.

The COURT.—The whistle was blown?

A. The whistle was blown.

The COURT.—And how long before that had the whistle blown?

A. Well, about two minutes or a minute and a half.

The COURT.—How far can you hear that whistle?

A. About two miles or two miles and a half.

The COURT.—Did they have lights on the “Noe G” at the time of the collision?

(Testimony of Oscar Peuna.)

A. It wasn't necessary to have a light.

The COURT.—I didn't ask if they thought it was necessary, I asked if they had?

A. No, they didn't have a light.

Mr. CHAMBERS.—Had you heard any horn or any whistle on the "Letruria" before the collision occurred?

The COURT.—They do not claim to have blown a whistle. There is no use asking about that. They made no noise at all.

Mr. CHAMBERS.—You may cross-examine.

Cross-examination.

(By Mr. SELLECK.)

Q. When you first saw the "Letruria," was it straight ahead of the "Noe G" if I understand you right? A. Yes, sir.

Q. Coming towards the "Noe G"?

A. Yes, towards the "Noe G."

Q. And about ten to fifteen feet away?

A. About ten or fifteen feet.

Q. After the lookout hollered, "There is a boat ahead," [45] or "a boat in front of us," did you hear any whistle on the "Noe G"?

A. Yes, sir.

Q. What was that whistle?

A. The steam whistle.

Q. How many times did she blow?

A. I can't tell, she blew from the time we started out north.

Q. How many times did it blow after you heard

(Testimony of Oscar Peuna.)

the lookout holler, "There is a boat ahead, or a boat in front," from that time until the boats struck, how many times did the whistle blow?

A. There was no time to blow any more whistle because it was too close. When we seen it it was only 15 feet until we got together.

Q. Did the "Noe G" alter its course from the time the lookout said there was a boat in front until the boats struck?

A. He couldn't change the course, it was too close, but he reversed the engine.

Q. They didn't change their course at all?

A. A little bit, but not much.

Q. Which way did they change their course?

A. Starboard.

The COURT.—Did he say they had changed their course?

A. They tried to, they changed the course a little but didn't change it much, it was too close. They had no time to change it.

Q. You did change the course a little to starboard, did you? A. Yes.

Q. And the "Letruria" did not change her course at all?

A. I don't think so, because I didn't see nobody on deck. [46]

Q. Will you explain to the Court how it came that if the "Noe G" changed her course to starboard, and the "Letruria" did not change her course at all, that the "Noe G" struck the "Letruria" instead of the "Letruria" striking the "Noe G"?

(Testimony of Oscar Peuna.)

The COURT.—I think that is argument, but go ahead.

A. The “Letruria” was coming towards her and there was a heavy sea and we had to hit her because the waves broke over to our side, there was a heavy sea coming, a heavy wave.

Q. Ask him if the waves that were running at that time would not throw his boat in-shore and away from the “Noe G” instead of towards the “Noe G”?

A. Perhaps you got the boats mixed.

Q. Ask him if the waves were not *stiking* the “Noe G” on the port side?

A. The wave was coming on our port, toward our port.

Q. Ask him under the conditions under which those two boats were, if that was not throwing the “Noe G” in towards shore and away from the “Letruria” at the time of the accident?

A. It couldn’t go around because the heavy sea was coming and the “Letruria” was coming towards that. We reversed the engine so we couldn’t avoid the collision at all, the way we were in the waves.

Q. Who was the lookout?

A. Peo Pela.

Q. Where was he stationed?

A. He was at the helm.

Q. There wasn’t any lookout then any more than the helmsman, was there?

A. Yes, there were other people on deck. [47]

The COURT.—That is not the question. Was the helm in the front of the ship or the stern, the bow or

(Testimony of Oscar Peuna.)

stern? A. It was in the middle.

The COURT.—Did the lookout have hold of the helm? A. Yes, sir.

Q. Who was it hollered, “There is a boat in front”?

A. Peo Pela, the one who was directing the course.

The COURT.—I didn’t find out where the helm was on the other ship. We will recall the witness.

Q. Who was captain of the “Noe G”?

A. I was acting as captain at the moment.

Q. Ask him who was the captain, not who was acting as the captain. Who was the captain at the time of the accident, of the collision? A. I was .

Q. How long had you been captain of that boat?

A. A little over a month.

Q. You stationed Peo Pela at the wheel?

A. The owner of the boat placed Peo Pela at the helm, because he had to go and look after the engine.

Q. Where was the owner at the time of the collision?

A. He was down underneath, at the engine.

The COURT.—Where was this witness at the time of the collision?

INTERPRETER.—He is speaking Spanish and I speak Italian, and I can’t understand him, he speaks broken Italian and broken Spanish, and I have tried to do it both ways.

GEORGE COUTS, sworn as interpreter to interpret from English into Spanish and Spanish into English. [48]

The COURT.—Where were you at the time of the collision?

(Testimony of Oscar Peuna.)

A. About two feet behind the cabin, cleaning some fish.

The COURT.—Where was the cabin, what part of the boat? A. About midship of the boat.

The COURT.—He was then nearer to the stern than he was to the bow?

A. Yes, sir, nearer the stern.

The COURT.—Was the wheel midship?

A. About in the middle. Probably a little bit nearer the stern, but near the middle of the ship.

The COURT.—Who else was on deck besides the lookout and you? A. Antonio Levaro.

The COURT.—Where was he?

A. Just one side of the man that was steering the boat.

The COURT.—And he was standing near the wheel, what was he doing at the time?

A. I was cleaning fish. He was sounding the whistle and giving an alarm.

The COURT.—Go ahead.

Q. You say they had been sounding the fog-horn ever since the fog first settled down?

A. From the time we started, because it was foggy when we left.

Q. What kind of horn was it?

A. It was a steam whistle from the steam engine.

Q. How often was he sounding it?

A. In the neighborhood of two minutes or probably 2 minutes and a half.

Q. Did he have anything to go by?

A. No, I was cleaning fish, but the man that was

(Testimony of Oscar Peuna.)

managing that had a watch alongside of him.

Q. Did the fog continue after the collision?

A. For about an hour and a half afterwards. [49]

Q. You never blew the fog-horn the rest of the morning, did you?

A. No, sir, we were all very busy assisting the people that got wrecked.

Q. And never blew it again all morning, is that correct?

A. No. Soon after that it cleared up.

Q. The fog lasted for about an hour and a half, didn't it?

A. We were very busy trying to give assistance to the other boat, and helped save all we could, and we were working with them.

Q. Which side of the "Letruria" was struck by the "Noe G"?

A. On the left-hand side, on the southerly course.

Q. On the port side?

A. Yes, going toward the south.

Q. How fast was the "Noe G" travelling at the time of the collision, or just before the collision?

A. I can't exactly tell, how fast it was going, but it was going pretty fast.

Q. It was going full speed ahead, wasn't it?

A. I think so, but of course I couldn't tell, I was not aboard.

(Recess until 2 P. M.)

Q. The "Noe G" was going full speed ahead?

A. On account of the foggy weather, I should judge it was going about three miles and a half an hour.

(Testimony of Oscar Peuna.)

Q. What did you mean by saying awhile ago it was going ahead then?

A. I mean we reversed full speed, reverse when we seen the other boat, we reversed full speed back.

Q. Whereabouts is the reverse lever on the boat?

A. About amidship. [50]

Q. A helmsman, in order to reverse that boat, has got to reach down nearly to his ankles, doesn't he?

A. No, the lever stands about as high like this cane, you can reverse that forward and backward just from where you are standing.

Q. Don't the helmsman have to stoop over to reverse it? A. No, sir.

Q. Does the helmsman stand on a level with the engine?

A. Yes, he can steer the boat with one hand, the pilot can, and with the other hand he can reverse it.

Q. Does he stand on a level with the engine with his feet down level with the engine, or is it pretty well up on the deck?

A. The machinery is about a foot and a half or so from the level of the boat, and it is about two or three steps to go down to the machinery.

Q. How long is that reverse lever?

A. About three feet.

LOUIS SKERO, sworn as interpreter to interpret from Italian to English and English into Italian.

[Testimony of Dosa Peo Pela, for Respondents.]

DOSA PEO PELA, called, sworn and examined on behalf of respondents, testified as follows:

Direct Examination.

Q. Were you on the “Noe G” on the 3d day of November, 1913, when the accident occurred when the “Letruria” was sunk? A. Yes, sir.

Q. What time of day did this accident occur?

A. About 7:15 in the morning.

Q. What kind of a morning was it?

A. He says a high sea and pretty foggy. [51]

Q. Where were you on the boat at the time this accident occurred?

A. It was about three miles from San Jose.

Q. What part of the boat were you on at the time this accident occurred?

A. He said he was on the wheel.

Q. How long had you been at the wheel?

A. He says he was on the wheel about 12 or 15 minutes before that happened.

Q. What was your duties on the boat at that time besides being at the wheel, if any?

A. He says nothing else but on the wheel.

Q. Was it your duty to be on the look out?

A. Yes, sir.

Q. Did the “Noe G” have a whistle or horn on it?

A. He says they had a whistle, they used to blow three times every few minutes, and had another kind of horn to blow in case of foggy weather.

Q. Was the whistle being blown that morning?

A. Yes, sir.

(Testimony of Dosa Peo Pela.)

Q. Who blew the whistle?

A. He says he blows the whistle himself at first, and the other, *Antonia Levero* he says he was blowing the horn.

Q. When did you first see the “*Letruria*”?

A. He says I was about 40 feet when I saw it first, and he hollered that there was a boat ahead of them and he told the other fellow to reverse the engine at full speed.

Q. Did you see anybody on the “*Letruria*” when you first saw it?

A. He says not before they came to a collision. The only thing he saw after they come together, one from out from the cabin with a cigarette paper in his hand.

Q. What part of the boat did he come from? [52]

A. From the cabin of the boat, from his engine.

Q. Was he smoking that cigarette?

A. No, he was holding these papers in his hands to make cigarettes.

Q. Who was that man?

A. He says only he kenw by sight, it was the brother of the fellow that owned the boat.

The COURT.—Was it the first man on the witness-stand?

A. He says the first one that was on the witness-stand.

The COURT.—Point him out in the courtroom.

A. He says the second one from this side.

The COURT.—The one sitting in the middle?

A. Yes, sir.

(Testimony of Dosa Peo Pela.)

Q. Did he say anything when he came up there?

A. He says to the fellows on the boat, he told them when they come together, he says, one of the sailors said to the party who was the owner of the boat, that he had better go driving dogs, instead of running a boat, it would be better to run a dog instead of a boat.

Q. What did he say when you told him that?

A. He said, he start to cry and told him to save him, that they were going to sink to the bottom.

Q. Did the "Letruria" change its course after you saw them, when they were 40 feet away?

A. No, sir.

Q. Was that all the conversation you had that took place at that time?

A. No, sir. One thing we were looking to save the boat.

Q. Who was running the engine on your boat?

A. Mr. Noe. [53]

Q. Who was running the engine on the "Noe G" at that time?

A. He said Mr. Noe, the man who was fishing, the owner of the boat.

Q. Ask him if the gentleman is in the courtroom now. A. Yes, sir.

Q. Who is he, will you point him out? This gentleman here, Mr. Chappi? A. Yes, Chappi Noc.

Q. Noe Chappi. Did you say anything to Mr. Chappi when you saw the "Letruria" ahead of you?

A. He said as soon as I saw him, I saw the boat, I told Chappi to reverse the engine full speed.

Q. Did he reverse the engines? A. Yes.

(Testimony of Dosa Peo Pela.)

Q. What did you do, if anything, after the boats came together.

A. He says all there was. He tried to save the boat, and they were close, but they tied a rope to the "Letruria" and the "Noe G" to try to tow them to Ensenada.

Cross-examination.

(By Mr. SELLECK.)

Q. Whereabouts was the "Letruria" when you first saw her?

A. He said it was going south and they were going north.

Q. In front of the "Noe G," or on one side or the other of it? A. Straight ahead.

Q. Coming toward the "Noe G"? A. Yes, sir.

Q. How far away was the "Letruria" when you first saw her? A. About 40 feet.

Q. Are you sure about that? A. Yes. [54]

Q. If Mr. Peuna says that the "Letruria" was between 10 and 15 feet away when you first saw her, he was mistaken, wasn't he?

Mr. CHAMBERS.—We object that Mr. Peuna did not say that he was in the same position that this witness was.

The COURT.—Translate the question and ask it.

A. He says when I saw the boat it was about 40 feet, but to reverse the engine, and they were still going ahead when the rest of them saw it. Perhaps it was that time, when they saw it, but we saw it before anybody else saw it.

The COURT.—Did you say anything when you

(Testimony of Dosa Peo Pela.)

saw the ship ahead, when you saw the “*Letruria*”?

A. As soon as I saw the boat I ordered the “Noe G” to reverse the engine, and he said it wasn’t anywhere that they could give them any side, they were steering right straight, they were so close.

The COURT.—What did you do when you saw the “*Letruria*”?

A. He says I was hollering, “That boat is ahead of us,” to reverse the engine, and so they did, the other party on their boat, so they were going backwards, and their boat came ahead square on the bow without nobody was on the deck.

The COURT.—Was your boat going backward when the collision occurred? A. Yes, sir.

The COURT.—Do you mean that the engine was going backwards or the boat was going backwards?

A. He says that the engine was turning backwards and also the boat was going backwards.

The COURT.—The speed forward then was entirely stopped and the ship was moving back when the collision occurred? [55]

A. He says we were standing, we were going backwards when the other boat came right on us.

The COURT.—How far were your ships apart when your ship stopped going forward?

A. About fifteen feet, but the other boat was going at full speed.

The COURT.—How fast was your ship going when you saw the “*Letruria*”?

A. He said they were going at the lowest speed, from two miles to three miles an hour.

(Testimony of Dosa Peo Pela.)

The COURT.—How big is your ship, how long is it? A. 38 feet long.

The COURT.—How wide? A. About 10 feet.

The COURT.—How far would your ship move before you can stop it when it is going a mile an hour?

A. It could stop right away.

By Mr. SELLECK.—Was your boat loaded or empty?

A. It was just light loaded, a few fish.

Q. About how many fish, how many pounds?

A. From five to six hundred pounds of barracuda.

Q. When your boat was travelling at from the rate of from two to three miles an hour, how far could you go before you could get the boat stopped and started backwards?

A. He says that when the boat was at low speed, that he could stop right away.

Q. Do you mean when he would reverse, he would stop immediately without moving forward at all?

A. Yes, sir.

(By the COURT.)

Q. Who reversed the engine?

A. Mr. Chappi. [56]

Q. You could not reverse the engine yourself?

A. I could reverse the engine at the same time, but he was down in the engine-room and could do it quicker.

Q. As soon as you saw the ship ahead, you hollered to reverse the engine, ship ahead? A. Yes, sir.

Q. Did you change your course any?

A. When we started to go backwards, we couldn't

(Testimony of Dosa Peo Pela.)

have changed anyway.

Q. How far backwards did you go?

A. It was about a half a minute. The other boat came on top of it so fast.

Q. How many feet backward did you go?

A. He says from about twenty to thirty feet.

Q. It moved backwards?

A. From 20 to 30 feet.

Q. It moved backwards from 20 to 30 feet?

A. Yes, sir.

Q. Ask him again and see if he got that right?

A. Yes, sir, he was going at high speed backwards.

(By Mr. SELLECK.)

Q. Did you alter your course at all, or attempt to?

A. No, he was standing, he said he didn't change no course.

Q. Did you give any signal to the other boat?

A. No, he was going straight ahead.

(Question read.)

A. Yes, he says they blow the whistle, then they blow the horn.

Q. Was that after he saw the "Letruria" that he gave that signal? A. Before.

Q. Did he give any signal after he saw the "Letruria"?

A. He says he did blow the horn, but they were so excited in backing up the boat. [57]

Q. Who blew the horn?

A. He says the other sailors blew the horn.

Q. What sailor? A. Antonia Levaro.

Q. How many times did he blow it?

(Testimony of Dosa Peo Pela.)

A. He says in about a half a minute before they got together.

(Question read.)

A. He says they were blowing the horn right along before.

Q. Ask him how many times they blew that horn from the time he saw the "Letruria" until they struck?

A. He said they blew the horn quite often, but when they saw the "Letruria" it was too late, and they were excited and come together, there was no time to blow it.

The COURT.—Were you going backwards when you saw the man coming out of the hold of the "Letruria"?

A. I didn't see any of them on deck before they hit the ship, hit the "Noe G."

Q. The "Letruria" has got a pilot-house, hasn't she? A. Yes.

Q. You saw Costa come out of the pilot-house after the accident?

A. Yes, when they come together, he comes out of the pilot-house.

Q. He didn't come out from the cabin then, did he, he came out from the pilot-house?

A. He said as they were together he comes out of the engine-room or cabin, the pilot-house.

Q. Ask the question whether he tried to change his course or did change his course.

The COURT.—I think he said two or three times he did not, that they were going backwards, that he

(Testimony of Dosa Peo Pela.)

stopped the engine and started backwards. Did you change your helm at all? [58]

A. No, sir.

Q. You were very badly excited at the time you saw this "Letruria" ahead, weren't you?

A. No, sir.

Q. Why didn't you whistle to the "Letruria" then?

A. He says we were going back and they were going at full speed, it was so close they didn't have any time, they were blowing the whistle before that time.

Q. Why didn't you blow the whistle as soon as you saw them?

A. A few minutes before they see the "Letruria," they blow this whistle, but as soon as they did see it, he reversed the engine, the fellow that was in the engine-room, Noe Chappi, and he didn't see anybody on the other side, and if they reversed their engine they wouldn't be in collision at all.

Q. Ask him if he had put his wheel hard over to port and went to starboard, if he would not have cleared the "Letruria" entirely?

A. He said that it *was close* that he couldn't, it wouldn't do no good, it was too late.

Q. You had been blowing the fog-horn right along, had you, before the accident? A. Yes, sir.

Q. How often?

A. It was about every two minutes.

Q. What were you going by, did you have a watch there?

A. Yes, they have a clock always ahead of them, so they can see it right along.

(Testimony of Dosa Peo Pela.)

Q. Did you blow your fog-horn by that watch or clock? A. Yes, sir.

Q. After the accident, after the collision it remained foggy, didn't it? A. Yes, pretty deep fog.

Q. Did you continue to blow your fog-horn after the accident [59] until the fog cleared up?

Mr. CHAMBERS.—I object as incompetent, irrelevant and immaterial.

The COURT.—Sustained.

Mr. SELLECK.—That is all.

[**Testimony of Antonio Levaro, for Respondents.**]

ANTONIO LEVARO, called sworn and examined on behalf of respondents, testified as follows:

Direct Examination.

(By Mr. CHAMBERS.)

(Louis Skero acting as interpreter.)

Q. Were you on the gasoline power boat "Noe G" on the 3d day of November, 1914? A. Yes, sir.

Q. What were you doing?

A. He says he was on the deck.

Q. Were you on the boat at the time this accident occurred? A. Yes.

Q. What time of day was it? A. About 7:15.

Q. What kind of weather was it?

A. Pretty foggy.

Q. What were you doing on the boat?

A. They were handling the barracuda on the deck, and watching out for boats.

Q. Did the "Noe G" have a whistle?

A. Yes, sir, it was a fog-horn.

Q. Was that whistle being blown that morning?

(Testimony of Antonio Levaro.)

A. Yes, sir.

Q. Who was blowing this whistle?

A. The fellow that was on the wheel, he used to blow the whistle right along, and he used to blow the horn too right along.

Q. The fellow on the wheel blew the whistle, and he blew the horn? [60] A. Yes, sir.

Q. How often was this whistle blown that morning, you were going up there?

A. He says every two minutes.

Q. How far can you hear that whistle?

A. He thinks that they can hear them about a mile and a half or two miles off.

Q. How far did you hear the fog-horn?

A. A quarter of a mile or a half a mile or so.

Q. Where did you first see the "Letruria"?

A. He says about two or four miles to San Jose.

Q. You mean you were about two to four miles from San Jose when you first saw the "Letruria"?

A. He said just about.

Q. How far was the "Letruria" from the "Noe G." when you first saw it?

A. He said it was about 40 feet.

The COURT.—Who saw it first?

A. The fellow that was on the wheel.

The COURT.—What did he say?

A. He said he hollered loud there was a boat ahead of him.

The COURT.—Tell the words he said.

A. He was hollering aloud, "The boat is ahead, to reverse the engine."

(Testimony of Antonio Levaro.)

Q. The man at the wheel hollered there was a boat ahead, to reverse the engine? A. Yes.

Q. Who was running the engine at that time?

A. Noe Chappi.

Q. Did he reverse the engines?

A. Yes, sir, right away. [61]

Q. Was there anybody on the deck of the "Letruria" when you first was it? A. No, sir.

Q. When did you first see anybody on the deck of the "Letruria"?

A. He says when we got in collision and got together, that is the only time we see a fellow come out from the cabin with his cigarette paper in his hand.

Q. Who was that fellow?

A. That one in the middle.

Q. What is his name, do you know?

A. I don't know.

Q. He came out of the cabin after the two boats came together, rolling a cigarette? A. Yes, sir.

Q. Did he say anything at that time?

A. He says he didn't say nothing but I told him he ought to be managing a wagon or something or other, that he was no good at managing boats.

Q. What did he say when you told him that?

A. He said he didn't say nothing.

Q. How short a time before you saw the "Letruria," did the "Noe G" blow the whistle?

A. He says it was perhaps a minute or half a minute, he didn't know exactly, but they were whistling right along.

Q. Did anyone on the "Noe G" blow a whistle

(Testimony of Antonio Levaro.)

after you saw the “*Letruria*”? A. No, sir.

Q. Did anyone on the “*Noe G*” blow the fog-horn after you saw the “*Letruria*”?

A. They were blowing about a half a minute before they see him, but they came so close so quick, they didn’t have no time.

Q. Did the “*Letruria*” change her course after you first saw her?

A. No, he said straight ahead without anybody on the deck.

The COURT.—Where were you standing with reference to the man at the wheel? [62]

A. He said he was standing about four feet from the man that was on the wheel.

Q. On which side?

A. The left side of the boat, the port side.

Q. Which way were you looking?

A. He said he was looking in every direction.

(By the COURT.)

Q. How comes it that you did not see the “*Letruria*” first?

A. He says that the man on the wheel saw it first.

Q. Was it plain to be seen when you saw it?

A. Not very well, it was so foggy.

Q. How far did the boat move after you saw it, before this man came out of the hold?

A. *It* says it was right close.

Q. How many feet were you from his ship when you saw him come out?

A. Ten to twelve feet.

Q. Did you holler at the ship, at the “*Letruria*”?

(Testimony of Antonio Levaro.)

A. He said he went right straight ahead with the boat to save the crew.

Q. Was this man rolling a cigarette when he came out, or just had the papers in his hand?

A. Only had his cigarette paper in his hand.

Q. Did he have any tobacco?

A. No, he couldn't say that, he couldn't see it.

Q. Did he have a package of cigarette papers or just one paper? A. One only.

Q. One piece of paper? A. One piece of paper.

Q. Were you going backwards then?

A. Yes, sir. [63]

Q. How long had you been going backwards when he came out of the hold?

A. He said the boat was pretty near standing still, it was about ten to twelve feet.

Q. Ten to twelve feet off from his boat, standing still? A. Pretty near still.

Q. The "Noe G"? A. Yes, sir.

Q. Your boat was standing still when you saw this man come out of the hold?

A. Yes, sir, it was standing still.

Q. Had you started back before it struck?

A. Yes, sir.

Q. How far back did you go?

A. He was from 12 to 15 feet, he can't tell exactly how much it was, but he thinks that much.

Q. Did your ship move backwards ten or fifteen feet before the ships came together?

A. He says his boat was going straight back, but we don't know how far he was.

(Testimony of Antonio Levaro.)

Q. Who owns the "Noe G"?

A. Noe Chappi.

Q. Is he in the courtroom?

A. Yes, the gentleman back there, talking.

Q. Are you working for him now? A. Yes.

Q. The man that was on the witness stand before, you were working for him also? A. Yes.

Cross-examination.

(By Mr. SELLECK.) [64]

Q. When you first saw the "Letruria," she was straight ahead of the "Noe G," was she?

A. Yes, sir.

Q. When you first saw her, was that before Mr. Peo Pela called there was a boat ahead, or afterwards?

A. It was the gentleman on the wheel that said it first.

Q. Was it before the man on the wheel called there was a boat ahead, or after, that he saw the "Letruria"?

A. He said the fellow on the wheel, Peo Pela, saw it first.

The COURT.—And called out, that is the way I understand his testimony.

Mr. SELLECK.—The question is whether he saw it before this man called out.

The COURT.—Did you see the ship before Peo Pela called out, "Ship ahead"?

A. Peo Pela saw it first.

The COURT.—Had Peo Pela said anything before you saw it?

(Testimony of Antonio Levaro.)

A. He hollered, "The boat is ahead; go full speed back," and they were all screaming.

Q. How fast was the "Noe G" travelling at the time you first saw the "Letruria"?

A. It was going about half speed, it was only about three miles an hour.

A. Going about half speed, is that correct?

A. He says he thinks it was just about half speed.

Q. How fast does the "Noe G" travel at full speed?

A. He says he doesn't know exactly; from six to seven miles.

Q. At the time you first saw the "Letruria," the "Noe G" was going more than two miles an hour, wasn't she?

A. We were going about three and a half miles an hour.

The COURT.—How fast was the "Letruria," going? [65]

A. He said he thinks he was going at full speed.

The COURT.—How many miles an hour?

A. He says that the boats were about even, they were making about seven miles an hour.

Q. Did you have any load on the "Noe G"?

A. We had about five to six hundred pounds of Barracuda.

Q. What distance does it take to stop the "Noe G" and start her travelling backwards, when the "Noe G" is travelling at the rate of three miles an hour?

(Testimony of Antonio Levaro.)

A. He said he could stop in less than half a minute.

Q. How much less than half a minute?

A. He says in about half a minute.

Q. It wasn't half a minute from the time you first saw the "Letruria" until they struck, was it?

A. The "Noe G" was going backwards at the time when they saw the boat, the "Letruria."

Q. Ask him how many feet ahead the "Noe G" went before she started backward from the time he reversed until she stopped and started backwards?

A. He said he didn't measure it.

Q. Ask him if he has got any idea of about how far they went.

A. He said he was going so slow that he started right backwards, going backwards right away.

Q. You did not go backward at all then after the reverse,—the boat started right backwards?

A. He said possibly he went four or five feet ahead and started to go backwards.

Q. Did the "Noe G" change her course at all from the time you first saw the "Letruria" until the two boats struck?

A. He said he was so close, we tried to save them, but we were too late. [66]

Q. Did they change their course?

A. He said it was too late; it was all we could do was to reverse the engine and go backwards.

Q. Did the "Letruria" change its course after you saw it? A. It was going straight ahead.

Q. You say you saw Costa come out of the cabin

(Testimony of Antonio Levaro.)

before the accident happened, before the collision?

A. No, just when they got together, when they were in collision.

Q. It was after they came together?

A. After the collision.

Q. He didn't come out of the cabin, did he, he came out of the pilot-house, didn't he?

A. He stated he came out from the cabin; the engine-room and cabin is all together.

Q. Ask him if the pilot-house isn't right there at the same place?

A. He says he came from the cabin, but that is all he knows.

Q. Do you mean to say there wasn't anybody at the wheel of the "Letruria"?

A. I couldn't say it, because I couldn't see it.

Q. You don't know whether there was or not, do you? A. No.

Mr. SELLECK.—That is all.

Mr. CHAMBERS.—Do you know where the wheel of the "Letruria" is?

A. He says it is down in the cabin, but he was never on the boat.

[Testimony of Noe Chappi, for Respondents.]

NOE CHAPPI, called, sworn and examined on behalf of respondents, testified as follows:

Direct Examination.

(By Mr. CHAMBERS.)

Q. Are you the owner of the "Noe G"?

A. Yes, sir. [67]

Q. Were you on the "Noe G" on the morning of

(Testimony of Noe Chappi.)

the 3d day of November, the morning they had the collision with the "Letruria"? A. Yes, sir.

Q. What time of the day was that?

A. 7:15 in the morning.

Q. What kind of a morning was it?

A. He said the sea was pretty rough and foggy weather.

Q. What were you doing that morning at the time of this accident?

A. He said he was in the engine-room, oiling up the engine, and the fellow was at the wheel; he hollered a boat was in ahead of him, to reverse the engine, so he reversed the engine at full speed.

Q. Who was the fellow who hollered for him to reverse the engine?

A. The man who was at the end,—Peo Pela.

Q. Did you reverse the engine?

A. He said as soon as he saw it, he reversed the engine right away.

Q. How fast was the "Noe G" travelling at the time he called out to you to reverse the engine?

A. About three miles.

Q. How far did the "Noe G" go after you reversed the engine and the boat stopped and started backwards? A. From five to six feet.

Q. At the time the collision occurred was the "Noe G" going backwards or ahead? A. Going back.

Q. Did you have a whistle on the "Noe G"?

A. A whistle and a horn. [68]

Q. Before this accident occurred, had this whistle been blown?

(Testimony of Noe Chappi.)

A. Yes, we were whistling every two minutes.

Q. Was the horn blown that morning before the accident occurred?

A. Yes, sir; they used the horn too.

Q. When did they use the horn?

A. He said they used it about as often as the whistle; they used the horn, too, as often as the whistle.

Q. You mean they used the whistle a part of the time and a horn part of the time?

A. Every once in a while one, and every once in a while the other.

Q. Whose duty was it to blow the whistle?

A. He said the man that was on the wheel blew the whistle, and the other fellow that blew the horn was beside the cabin, on the deck.

Q. How long before this collision occurred had this horn been blown? A. About half a minute.

Q. What was it was blown about half a minute, the whistle or the horn? A. The horn.

Q. How far can that horn be heard.

A. About a half a mile, maybe three-quarters of a mile.

Q. How far was the "Letruria" from the "Noe G" when you first saw it?

A. It was about from 30 to 40 feet.

Q. Could you see the "Letruria" from where you were working, from the engine-room?

A. He says as soon as the man on the wheel told me to reverse the engine, I did; I reversed the engine right away, and he jumped up so he could see, and he was about 30 feet off from the "Letruria."

(Testimony of Noe Chappi.)

Q. Did you see anybody on the "Letruria"?

A. Nobody on the deck. [69]

Q. Do you know where the wheel is on the "Letruria"?

A. He says the wheel stands on the "Letruria" like most boats, in the cabin, but they have got a kind of pilot-house on the top.

Q. Could you see whether there was anybody at the wheel of the "Letruria" from where you were?

A. He said he couldn't see no one; he said they had a glass, but if there was, he could see them.

Q. If there was anyone there, you could see them?

A. Yes.

Q. Was there anyone there at the wheel when you looked up? A. No, he didn't see nobody.

Q. When did you first see anybody on the "Letruria"?

A. When we came in collision he saw the fellow come down with a cigarette paper in his hand.

Q. What fellow was that, Mr. Costa?

A. The fellow in the center on the first seat.

Q. What did he say, if anything, when you first saw him? A. Nothing.

Q. Did you say anything to him?

A. No, he didn't say anything until the other sailors told him that it would be better to go and manage a wagon, instead of a boat.

Q. Who was the sailor told him he had better go manage a wagon instead of a boat?

A. Levaro Antonio.

Q. What did the man say, what did Mr. Costa say

(Testimony of Noe Chappi.)

when Levaro told him he had better go manage a wagon instead of a boat?

A. He didn't say nothing.

Q. What did this man do when he came up on the deck of the "Letruria"? [70]

A. He said he just came out and was hollering, but he didn't say anything what to do, but was kind of excited.

Q. How long was it before you saw any one else besides this man on the "Letruria"?

A. He says when he got in collision one came out without a hat and the other one without shoes, on top of the deck.

Q. They came out after Mr. Costa came out?

A. Yes.

Q. You reported this accident to the commandant at Ensenada, did you, after it occurred that night?

A. Yes, sir.

Q. Was Mr. Costa there at the time?

A. He said he went before the harbormaster, whatever they call him, of Ensenada, with Costa together, to report about the accident.

Q. Was the man you went before at Ensenada, Mr. Verdugo? A. Yes, sir.

(By the COURT.)

Q. Who did you first see on the "Letruria"?

A. The man that was on the wheel saw him first.

Q. What man on the "Letruria" did he see first,—did he see anybody on the "Letruria"?

A. He said he didn't see no one on the deck or anywhere on the boat before we got in collision.

(Testimony of Noe Chappi.)

Q. Was it after the boat struck that he saw him?

A. When they get in collision. This one came with the cigarette paper and the other two came right after.

Q. The fellow that had the cigarette paper, was he fully dressed? A. Yes, sir. [71]

Q. Was he rolling a cigarette?

A. All we see was a cigarette paper.

Q. How many pieces of paper did he have?

A. Only one.

Q. Did he have any tobacco?

A. No, he didn't see no tobacco.

Q. How far back did your boat go after you reversed?

A. He says the boat was going backwards. Perhaps we went backward from 15 to 20 feet.

Q. Were you the engineer? A. Yes.

Q. How long had you been down at the engine?

A. He said it was about six or seven minutes. He said he went to oil up the engine.

Q. Can they reverse the engine from on deck where the wheel is? A. Yes, sir.

Q. How far is the engine from the door of the cabin?

A. About two feet distance from the wheel to the engine.

Q. How far would he have to go from the engine back to where he could get out of the cabin, out of the engine-room?

A. He says about three stairs from the engine-room to the deck.

(Testimony of Noe Chappi.)

Q. Come right straight up? A. Yes, sir.

Q. You did not have to go toward the stern any to come up?

A. No, sir; you come straight up from the engine-room.

Q. When you got out and saw the ship, did you think they were thirty feet apart? A. About 20.

Q. Were you still going backwards?

A. He says we were going so slow when I reversed the engine, we were going backwards when I got out on the deck. [72]

Q. When you got out on the deck, you were going backwards? A. Yes, sir.

Q. You were going backwards at full speed?

A. Yes, sir.

Q. You were going forward on slow speed?

A. We were going at first slow from two miles and a half to 3 miles.

Q. How fast were you going backward when the collision occurred?

A. He says they can't tell the speed going backward, but the average the boat goes 6 miles an hour or seven.

Q. How big a hole did you make in the other ship?

A. I didn't have a chance to see, but I saw where the boat came to us, and the hole was pretty low; he couldn't say how big the hole was.

Q. That is to say, the "Letruria" was on top of their ship?

A. They came on top with a kind of a high sea, and the hole was quite low below the water line.

(Testimony of Noe Chappi.)

Q. How far from the bow of the "Letruria" was the hole?

A. He says we were about a foot and a half of two feet from the bow.

Q. Was the hole big enough for a man to crawl in?

A. We didn't see the hole?

Q. You didn't see the hole at all? A. No, sir.

Q. Were the ships going that way?

(Handing witness Exhibit "A.")

A. He said they were going on their course; their boat comes right over and hit on the side of the bow, but pretty low, that he didn't see the hole. He said they were going just about as they stand now, but when I back up where the back was, it would [73] bring the bow to the left, and they came right square on us at full speed; he says there was high water and rough water. There was rough water and when I back up it brings the bow to the left, but they come with such high speed that the side of their boat hit pretty high on their boat, on the left side.

Q. As they were going backwards, they swung this "Noe G" to the left, swung the bow around to the left?

A. Yes, that is what he said, that he thinks he did.

The COURT.—Do you want this marked, either of you?

Mr. CHAMBERS.—No objection.

The COURT.—Mark it Court's Exhibit "A."

[Testimony of Gerald Brigante, for Respondents.]

GERALD BRIGANTE, called, sworn and examined on behalf of respondents, testified as follows:

Direct Examination.

(By Mr. CHAMBERS.)

Q. What is your business? A. Fish dealer.

Q. Were the Costa boys fishing for you on the 3d day of November, 1914? A. Yes, sir.

Q. Do you know anything about this accident which occurred between the power boats "Noe G" and the "Letruria"?

A. Yes, I know after Mr. Costa came in.

Q. Did you have a conversation with the Costas as to how this happened? A. Yes, sir.

Q. When was that?

A. It was about seven or eight, or eight or nine days after.

Q. After the accident? A. Yes, sir. [74]

Q. Where did this conversation take place?

A. At the Jorres wharf.

Q. Is that where your fish market is?

A. No, sir; my fish market is on Atlantic street between F and G.

Q. What was that conversation? Just state to the Court what they said to you and what you said to them with reference to how this accident occurred.

The COURT.—Which one did you talk to, both of them?

A. No; just one of the Costa brothers.

Q. Which one? A. It was Joe Costa.

Q. The one sitting on the end?

(Testimony of Gerald Brigante.)

A. Yes, the second one from the inside.

Q. The one sitting in the middle of the four?

A. Of those four, the second one from the inside.

Q. What did he say?

A. At this time when I see him, I was very sorry because it was one of my fishing boats, and I was very sorry when I heard of that happening, and I saw him and asked him how that happened to come out and he says to me, "Well, I don't know myself, but the only thing is, I wish I had sunk with the boat myself," and I say, "Why?" and he says, "I wish I sunk myself with the boat." And I said, "What is the reason?" and he said, "I was in the boat sleeping when it came," and I said, "There was nobody on top of the deck?" And he said, "Me, and the other fellow was sleeping and my brother, he was down at the engine, and making a cigarette for himself." And he didn't give me any much information, but he said, "That is our fault."

Q. He stated to you at that time there was no one on the deck of the "Letruria."

A. He said there was nobody on the deck.

Q. What was it he said about his brother rolling this cigarette? [75]

A. He said, "My brother was down in the hold, making a cigarette for himself," that is all he said. He didn't give me any of the other information at all.

Q. You are very well acquainted with this "Letruria," this boat?

A. I know this man very well, and I know this

(Testimony of Gerald Brigante.)

fellow a little over four or five years; he been fishing for me before that time.

Q. You have known this "Letruria," the boat, for four or five years?

A. No, I know the boat for about three years.

Q. Do you know what that boat is worth, or was worth?

A. I don't know what that boat was worth, but I know what the engine was worth, but I don't know about the boat.

Q. Did you ever sell this particular engine that was in this boat? A. Yes, sir.

Q. When was that?

A. It was about three years.

Q. About three years ago? A. Yes, sir.

Q. And what was the price of that engine at the time you sold it? A. \$1150.

Q. That was about three years ago?

A. About three years ago.

Q. Was the engine new at that time?

A. It was brand new.

Q. Do you know what it would cost to build that boat?

A. I don't know anything about it. I can't tell you what it cost a boat at all. I haven't got no idea at all.

Cross-examination.

(By Mr. SELLECK.)

Q. Did you speak Portuguese? [76]

A. I didn't speak it very well, but I understand it very well.

(Testimony of Gerald Brigante.)

Q. You did understand it well, you say?

A. Sure! I have been, from these people on the wharf, and been talking with them once in a while one word in Portuguese and one word in English and one word in Spanish, but I can understand every word those people say when they talk to me.

Q. Does the "Noe G" fish for you now?

A. No, sir.

Q. You say that N. Costa, the second one from this end, told you that his brother was down in the hold making a cigarette? A. Yes, sir.

Q. He also told you he was asleep? A. Yes, sir.

Q. Did he explain to you how he knew his brother was? A. Yes, sir.

Q. What did he say?

A. I said, "Did you see that, the boat 'Noe G,' when she came against you?" And he said, "No, I was below sleeping." I said, "Who was on guard when that came?" He said, "My brother was on the *road*," but he said, "Just that minute he was in the hold making a cigarette for himself," and that is all, and he says, to me, "Well, I see the man was very sorry," and he says, "I wish I sunk with the boat myself." He means to say that he was very sorry. He didn't say nothing else.

Q. Have you ever *have* any trouble with the Costas? A. Never.

Q. They are not fishing for you now? A. No.

Q. They are fishing at the present time?

A. Yes, after they lost the boat they didn't be fishing any more.

(Testimony of Gerald Brigante.)

Q. You say that engine sold for \$1150?

A. Yes, that is the price the engine costs. [77]

Mr. SELLECK.—That is all.

The COURT.—Did you ever run any of those boats?

A. Never. I have been running a sail boat. I have been fisherman myself for about 15 years, but never run any power boat.

Mr. CHAMBERS.—The Costa boys were fishing for you on the 3d of November, when this accident happened? A. Yes, sir.

The COURT.—What are you—a Spaniard?

A. I am an Italian, born in Genoa. I have been in this country 28 years, and have been a citizen for 21 years past.

[**Testimony of Melcades Verdugo, for Respondents.**]

MELCADES VERDUGO, called, sworn and examined on behalf of respondents, testified as follows:
(GEORGE COUTS acting as interpreter.)

Direct Examination.

(By Mr. CHAMBERS.)

Q. What was your occupation on the 3d day of November, 1914?

A. I was commander of the port.

Q. What port? A. Ensenada.

Q. Was there a report made of an accident which took place between the “Noe G.” and the “Letruria,” made to you on the 3d day of November?

A. Yes; the captain of each one of the two vessels

(Testimony of Melcades Verdugo.)

arrived at my house about eight o'clock,—in the neighborhood of eight o'clock.

Q. At your house in Ensenada? A. Yes, sir.

Q. Do you know the name of these two gentlemen who came to your house? [78]

A. I know Mr. Costa, captain of the "Letruria."

Q. Which Mr. Costa was that?

A. The second gentleman in the front seat there.

Q. Did Mr. Costa make a statement to you at that time as to how this accident happened?

A. At first when they made the report to me, I asked them the distance from shore and they said it was about a mile and a half from the shore. Being under the jurisdiction of the Mexican courts, he asked Mr. Costa to wait until to-morrow, that he would investigate the case, and let him know to-morrow what can be done about it, but then Mr. Costa told me that we had better let it go then, "It was all my fault; the accident was my fault, and I don't want to bother with it any more," and went away.

Q. Did Mr. Costa say anything about why it was his fault? A. Some of his crew was asleep.

Q. Did he say anything about whether there was anyone on the look out or at the wheel or not?

A. No; he didn't say anything about that.

Q. Did you have any other conversation with him the following morning?

A. No, they left there that night, and being they were the parties interested in it, and didn't want to make any more complaint about it, they dropped it

(Testimony of Melcades Verdugo.)

right there, so I didn't investigate it any further.

The COURT.—Is there any controversy about the jurisdiction.

Mr. SELLECK.—They admit the jurisdiction of this court.

The COURT.—This collision occurred on the high seas, there is no controversy about that?

Mr. CHAMBERS.—They allege in the libel that this occurred three miles from shore; we deny that and say that it occurred a mile and a half from shore.

Q. Who told you at that time the collision occurred a mile and a half from shore? [79]

A. The two captains, Mr. Oscar and Mr. Costa, I asked them in particular, because if it came in the jurisdiction of the courts, I would take it up for them. If it didn't I wouldn't have anything more to do with it at all.

Q. Did Mr. Costa state to you that you should make a report exonerating the crew of the "Noe G"?

A. No; seeing that he was the complaining witness and I would have to investigate the case for him before I could make any report, so there was no report made of it at all, I would have to make a report first and then take it up with the courts, in the Superior Court.

Q. Did he make any statements to you about the first he knew about this accident, they were so close that he didn't know what did happen?

A. Yes, sir, because it was very foggy.

Q. Did he make a statement to you that they were all down in the hold of the boat?

(Testimony of Melcades Verdugo.)

A. Yes, it was their fault.

By the COURT.—That was not the question. What did Costa say about the crew on the “Letruria” being on deck or in the hold?

A. He said they were asleep and naturally they would have been down in the hold.

Q. Did Costa say they were all down in the hold or did he infer that?

A. His language was they were asleep.

Q. Did he say his brother was asleep?

A. No; he didn’t say his brother.

Q. Did he say anything about the captain,—that is his brother, isn’t it,—did he say anything about his brother being away from [80] the wheel at the time of the collision?

A. Yes, they said it was their fault, and of course, I took it for granted.

Q. That is not the question, did Costa say whether his brother was at the wheel at the time of the collision? A. No, he didn’t say that.

Q. Did he talk with Costa, the Captain of the “Letruria”? A. Yes, sir.

Q. What did he say?

A. They went there to make a complaint, as I stated, and then telling me also it was their own fault.

Q. That is not the question. Tell us what Captain Costa said?

A. He told me that the boats had collided, had a collision.

Q. Did he go to his place to make a complaint

(Testimony of Melcades Verdugo.)

about the other boat?

A. No, they just went there to make a report, not to make any complaint about it, but to make a report to me about it.

The COURT.—Go ahead.

Cross-examination.

(By Mr. SELLECK.)

Q. Which one of the Costas was it that you talked with?

A. The gentleman that was acting as captain at the time.

Q. The one on the end or next to the end?

A. The second one.

Q. Did you talk to the man on this end at all?

A. No, he was there also, but I just got the statement from the other one.

Q. Did he have an interpreter there?

Q. What little Spanish they spoke I understood it.

Q. They did not talk very much Spanish, did they? [81]

A. No, but just what they told me I could understand it very plain.

Q. The man who came with *costa* there, the Captain of the other boat, was a Mexican, wasn't he?

A. Yes, sir.

Q. A great friend of yours, wasn't he?

A. I just know him in a business way, when they go back and forth in boats like the other captain.

Q. As a matter of fact wasn't it Oscar Peopela that told you that it was Costa's fault and not Costa himself? A. No, they told me themselves.

(Testimony of Melcades Verdugo.)

Q. *Who* do you refer to by “They”?

A. I asked the two of them together, and then Costa spoke up and said it was our fault, it was very foggy.

Mr. CHAMBERS.—Defendant rests.

[**Testimony of M. Costa, for Libellants (Recalled).**]

M. COSTA, recalled on behalf of libellants, testified as follows:

(L. OLIVER acting as interpreter.)

Direct Examination.

(By Mr. SELLECK.)

Q. Did you understand what Mr. Brigante said while he was on the stand here?

A. He said he understood a little.

Q. Did you ever tell Mr. Brigante that your brother was down in the engine-room making a cigarette at the time of this accident? A. No, sir.

Q. Did you tell the Mexican commander of the Port at Ensenada that it was your fault that this accident happened?

A. He said he didn't tell him. In fact he didn't know, that he was asleep and had been asleep for half an hour and he didn't know whose fault it was [82]

Q. Ask him if he told the commander down there that. A. He says, no, sir.

Q. Did you go to the commander of the port to make any complaint?

A. No, sir. He said when he went to the commander of the port it was just, it was to sign a dis-

(Testimony of M. Costa.)

patch so they could come back. He had to sign a dispatch so as to come back to San Diego.

Q. Was there anything said between you and the commander of the port about this accident there?

A. He said he had lost a boat.

Q. Whereabouts is the pilot-house on the "Letru-
ria?"

A. He said it is right over the engine-room.

Q. About whereabouts in the boat, in the middle of the boat?

A. He says it is about midship, a little towards the bow.

The COURT.—Did you tell the man at the Port at Ensenada that it was the fault of your brother?

A. No, sir.

Cross-examination.

(By Mr. SELLECK.)

Q. You did not have any conversation with the commander of the port at all as to how this accident occurred?

A. He said that the only conversation he had with him, that he just told him that he had lost a boat and how it happened, and the commander told him he had better wait until the next day so he could investigate what he could do for him, and he told the commander he would if he would give him a place to sleep, and a meal, he couldn't stay there without anything to eat or any place to sleep.

Q. He did make a report to the commander then that the boat had been lost and how the accident occurred?

(Testimony of M. Costa.)

A. No, sir, he didn't go there with that purpose at all, it was just to sign a dispatch to come to San Diego [83]

Q. What kind of dispatch were you going to sign?

A. He said it was just to sign their names to the dispatch and the other boats to bring them to San Diego.

Q. There wasn't any conversation took place there at all as to how the accident occurred?

A. Just that they had had a collision and had lost a boat, was all.

Q. No question asked about whose fault it was?

A. No, sir.

Q. Why did the commandant ask you to stay there until the next day, so he could investigate it?

A. He said he just went to him on account of this dispatch, and he told him that another higher officer above him, he couldn't state the name, asked him to stay so he could investigate.

Q. And he asked him to give him a bed and a meal so he could stay over until the next day?

The COURT.—You needn't ask him that, he said that.

Q. Did you stay over until the next day?

A. No, sir, he came home the same night on the "Panama."

The COURT.—How came this ship to go into Ensenada, was this beyond Ensenada or this side of Ensenada?

Mr. SELLECK.—It was on the other side of Ensenada.

(Testimony of M. Costa.)

The COURT.—Are you going to follow up the question of jurisdiction?

Mr. CHAMBERS.—We haven't admitted the jurisdiction of this court any more than we filed an answer and denied we were three miles out of shore. They have to prove their allegations. It is not our place to prove their allegations.

Mr. SELLECK.—Ask Mr. Costa how far out to sea the accident happened. [84]

A. He said he didn't know how far it was, he had been asleep for half an hour and didn't know.

The COURT.—Ask the other Costa how far they were out to sea?

A. He said it was a heavy fog, but as near as he could say more or less it was about two miles and a half.

[Testimony of Harry McDrugal, for Libellants.]

HARRY McDRUGAL, called, sworn and examined on behalf of libellants, testified as follows:

Direct Examination.

(By Mr. SELLECK.)

Q. What is your name? A. Harry McDrugal.

Q. What is your business? A. Fish merchant.

Q. Are you acquainted with gasoline power boats?

A. Yes, sir.

Q. Have you ever handled them?

A. I have got an engineer's license, and worked in boat-houses for three years.

Q. How long have you been handling and been working around boats?

A. Ever since I was 18 years old.

(Testimony of Harry McDrugal.)

Q. How long is that? A. I am 31 now.

Q. Are you acquainted with the "Noe G"?

A. Yes, sir.

Q. Will you state to the Court how far a boat of the size of the "Noe G," with an engine like the "Noe G" has in it, would go before it could be stopped when she was reversed full speed back, when she was travelling in the neighborhood of three miles an hour at the time she was reversed.

A. I don't think it could be stopped in less than two boat lengths. [85]

(By the COURT.)

Q. Suppose it were only going a mile an hour forward, how long would it take to stop her by reversing the engine?

A. I don't think she could stop in her distance.

Q. In her length? A. Yes, sir.

Q. That would be 30 feet? A. About 30 feet.

Q. How long would it take to get her started backwards?

A. When a boat is running half speed, you can't throw her wide open and run her full speed right in a second, you have to go down and reach a lever, speed her up, and then throw her.

Q. When they reversed the engine to stop her, wouldn't she naturally go right backward as soon as she got stopped? A. Why, sure.

The COURT.—Go ahead.

(By Mr. SELLECK.)

Q. Are you familiar with the values of boats?

A. Yes, sir.

(Testimony of Harry McDrugal.)

Q. Are you acquainted with the "Letruria"?

A. Yes, sir.

Q. State to the Court what the market value of the "Letruria" was at the time of the collision?

A. It was worth, I was present when she was sold, the bill of sale was made, \$2,750. That was about two months after.

The COURT.—I don't believe that question is disputed. They did not offer any evidence as to that.

Cross-examination.

(By Mr. CHAMBERS.)

Q. Did you ever run the engine on the "Noe G" or any boat of this size, out in the water? [86]

A. I have run a boat, a little bigger and the same size.

Q. Have you ever met another boat and immediately reversed your engine to see how quickly you could stop it?

A. I have done it in the boat-house a good many times.

Q. Have you ever done it out in the ocean when the waves were rolling? A. Yes, sir.

Q. When was that?

A. When I was fishing.

Q. You mean to say you have reversed an engine on a boat when you were out in the ocean fishing?

A. When the boats are trawling you have got to reverse lots of times.

Q. You mean you have reversed at full speed back?

A. Throw it out quickly when there is danger.

Q. Did you ever meet any other boat when you have done that?

(Testimony of Harry McDrugal.)

A. I don't say that, I say that any boat you can't stop no boat in less than two lengths of the boat at half speed.

Q. Did you ever try it?

A. I have tried it and I know.

Q. Reverse it at full speed reverse?

A. Yes, sir, a boat going half speed you can't stop it in less than two lengths of the boat.

Q. You were friendly with the Costa boys?

A. I am.

Q. And have been friendly with them for a long time? A. I am.

Mr. SELLECK.—Plaintiff rests. [87]

*In the District Court of the United States of
America, in and for the Southern District of
California.*

M. COSTA, JOE H. COSTA, and JOHN SILVA,
Libellants,

vs.

Gasoline Power Boat "NOE G,"

Libellee.

Notice of Appeal.

Sirs:

Take notice that Onirato Chappi, owner of the gasoline boat "Noe G" hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the decree entered herein April —, 1915.

Dated San Diego, California, May 3d, 1915.

Yours, etc.,

CROUCH & CHAMBERS,

Proctors for Appellant.

To C. G. Selleck, W. J. Mossholder, Marks P. Mossholder, and Rusk P. Mossholder, Proctors for Libellants.

William M. Van Dyke, Esquire, Clerk of the District Court of the United States of America, in and for the Southern District of California.

[Endorsed]: Original. No. 367-Civil. In the District Court of the United States of America, in and for the Southern District of California. M. Costa, et al., Libellants, vs. Gasoline Power Boat, Noe G, Libelee. Notice of Appeal. Received copy of the within Notice of Appeal this 5th day of May, 1915. C. G. Selleck & Marks P. Mossholder, Proctors for Libellants. Filed May 8, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Crouch and Chambers, Proctors for Appellant. [88]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

M. COSTA, JOE H. COSTA, and JOHN SILVA,

Libellants and Respondents,

vs.

Gasoline Power Boat "NOE G," ONERATA
CHAPPI,

Claimant and Appellant.

Petition [for Appeal].

To the Honorable United States Circuit Court of Appeals for the Ninth Circuit.

The petition of Onerata Chappi, the appellant herein, respectfully shows as follows:

I.

That on or about the 10th day of February, 1915, the libellants filed a libel in the District Court of the United States of America in and for the Southern District of California against the above-named gasoline power boat, "Noe G," in a cause in admiralty to recover the sum of Two Thousand, Eight Hundred and Fifty Dollars (\$2,850) alleged to be due the libellants from said gasoline power boat, with interest and costs as by reference to said libel will more fully appear.

II.

That on or about the 20th day of February, 1915, Onerata Chappi filed an affidavit of ownership of said gasoline power boat, "Noe G"; that on or about the 26th day of February, 1915, Onerata Chappi, the owner of said gasoline power boat, duly appeared and filed his answer to said libel, praying that the libel be dismissed with costs, as by reference to said answer will more fully appear. [89]

III.

That on or about the 6th day of April, 1915, said cause came on for hearing before the Honorable Oscar A. Trippet, Judge of said District Court. That on the 9th day of April, 1915, a final decree was made and entered in said suit whereby it was adjudged

that the libellants have judgment against said Onerata Chappi for the sum of Twelve Hundred and Ffty Dollars (\$1,250) and that each party herein pay the costs by said party incurred.

IV.

The above-named Onerata Chappi, owner of said gasoline power boat, "Noe G," and the appellant herein, is advised and insists that said final decree is erroneous in that the evidence introduced in said cause shows that the collision upon which this action is founded was directly caused by the carelessness and negligence on the part of the libellants herein, and that said gasoline power boat, "Noe G," and her owners and operators, were not negligent and that said action was in no wise the fault of said gasoline power boat, or her owners or operators.

V.

For this and other reasons, the above-named owner and appellant appeals from said final decree to the United States Circuit Court of Appeals for the Ninth Circuit and on said appeal intends to ask a new decision on the law and on the facts upon the pleadings and proofs in said District Court, and prays that the records and proceedings aforesaid may be returned to the United States Circuit Court of Appeals for the Ninth Circuit, and that said decree may be reversed, and that it be decreed that libellants take nothing by their said libel and that appellant have judgment for his costs in the District Court and in this court.

Dated, San Diego, California, May 29th, 1915.

CROUCH & CHAMBERS,

Proctors for Appellant. [90]

[Endorsed]: Original. No. 367—Civil. In the United States Circuit Court of Appeals for the Ninth Circuit. M. Costa, Joe H. Costa, and John Silva, Libellants and Respondents, vs. Gasoline Power Boat “Noe G,” Onerata Chappi, Claimant and Appellant. Petition. Filed Jun. 1, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Crouch and Chambers, Proctors for Appellant. [91]

*In the District Court of the United States of America,
in and for the Southern District of California.*

M. COSTA, JOE H. COSTA and JOHN SILVA,
Libellants and Respondents,

vs.

Gasoline Power Boat “NOE G,” and ONERATA
CHAPPI, Owner,

Appellant.

Bond.

KNOW ALL MEN BY THESE PRESENTS:
That we, Onerata Chappi as principal and Virgil Bruschi and G. Bregante as sureties, all of the city of San Diego, county of San Diego, State of California, are held and firmly bound unto the above-named M. Costa, Joe H. Costa and John Silva for the sum of Two Hundred and Fifty Dollars (\$250) to be paid to the said M. Costa, Joe H. Costa and John Silva for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the 19th day of May, in the year of

our Lord, one thousand nine hundred and fifteen.

WHEREAS, the above-named Onerata Chappi has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree rendered in the above-entitled suit by the Judge of the District Court of the United States of America in and for the Southern District of California.

NOW, THEREFORE, the condition of this obligation is such that if the above-named Onerata Chappi shall prosecute said appeal to effect and answer all damages and costs if he failed to make said appeal good, then this obligation shall be void, [92] otherwise the same shall be and remain in full force and virtue.

ONERATA CHAPPI.
VIRGIL BRUSCHI.
G. BREGANTE.

Sealed and delivered and taken and acknowledged this 19 day of May, 1915.

[Seal] CLAUDE L. CHAMBERS,
Notary Public in and for the County of San Diego,
State of California.

Approved by

OSCAR A. TRIPPET,
Judge.

[Endorsed]: Original 367-Civ. In the District Court of the United States of America, in and for the Southern District of California. M. Costa, Joe H. Costa, and John Silva, Libellants and Respondents, vs. Gasoline Power Boat "Noe G," and Onerata

Chappi, Owner, Appellants. Bond. Copy of Written Bond Received and Approved this 20th Day of May, 1915. Marks P. Mossholder, C. G. Selleck, Proctors for Libellants. Filed May 22, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Crouch and Chambers, Attys. for Appellant. [93]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

M. COSTA, JOE H. COSTA and JOHN SILVA,
Libellants and Respondents,
vs.

Gasoline Power Boat "NOE G," ONERATA
CHAPPI,
Claimant and Appellant.

Assignment of Error.

And now comes Onerata Chappi, owner and claimant gasoline power boat "Noe G," appellant, and makes and files this, his assignment of error.

First. That the Court for the Southern District of California erred in not rendering judgment for the defendant on the pleadings in said cause.

Second. That the Court erred in rendering judgment for the plaintiff on the facts found.

Third. That the findings of fact are insufficient to support the judgment.

Fourth. It appears that the judgment aforesaid, in form aforesaid given, was given for M. Costa, Joe H. Costa and John Silva, libellants, against the said gasoline power boat "Noe G," whereas by reason of

the law, the said judgment ought to have been given for the said Onerata Chappi, owner and claimant of the said gasoline power boat "Noe G."

Fifth. That it was conclusively shown by the evidence that the libellants below have no cause of action.

Sixth. That the evidence is wholly insufficient to sustain any findings of negligence on the part of the owners or operators of the libelled gasoline power boat "Noe G," at or before the happening of the collision.

CROUCH & CHAMBERS,

Attorneys for Claimant and Appellant, 505-506

Watts Bldg., San Diego, California. [94]

[Endorsed]: Original. No. 367-Civil. In the United States Circuit Court of Appeals for the Ninth Circuit. M. Costa, Joe H. Costa and John Silva, Libellants and Respondents, vs. Gasoline Power Boat "Noe G," Onerata Chappi, Claimant and Appellant. Assignment of Error. Filed Jun. 1, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Crouch and Chambers, Attorneys for Claimant and Appellant. [95]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 367-CIV.

M. COSTA et al.,

Libellants,

vs.

The Gasoline Launch, "NOE G," etc.,

Respondents.

Praeipie [for Transcript of Record on Appeal].

To the Clerk of said Court.

Sir: Please issue Transcript of Record on Appeal in the above-entitled action, to contain copies of the following papers and orders, viz.:

1. Statement of Proceedings;
2. Libel;
3. Affidavit of Ownership;
4. Answer to Libel;
5. Minute Order Amending Libel;
6. Findings of Fact and Conclusions of Law;
7. Final Decree;
8. Exhibit "A";
9. Transcript of Testimony;
10. Notice of Appeal;
11. Petition for Appeal;
12. Bond on Appeal;
13. Assignments of Error; and
14. Praeipie for Preparation of Transcript of Record on Appeal;

said Transcript of Record to be duly certified under the hand [96] of the clerk and the seal of the court.

CROUCH & CHAMBERS.

By CHAMBERS,
Proctor for Appellant.

[Endorsed]: No. 367-Civil. United States District Court Southern District of California, Southern Division. N. Costa et al. vs. Gasoline Launch "Noe G," etc. Praeipie for Preparation of Transcript of

Record on Appeal. Filed Nov. 20, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk.
[97]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 367—CIV.—S. D.

M. COSTA, JOE H. COSTA and JOHN SILVA,
Libellants,

vs.

Gasoline Power Boat "NOE G,"

Defendants.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing ninety-seven (97) typewritten pages, numbered from 1 to 97, inclusive, to be a full, true and correct copy of the Libel, Affidavit of Ownership, Answer, Minute Order Amending Libel, Findings of Fact and Conclusions of Law, Final Decree, Exhibit "A," Transcript of Testimony, Notice of Appeal, Petition for Appeal, Bond on Appeal, Assignments of Error, and Praecipe for Preparation of Transcript in the above and therein-entitled cause, and that the same, together with the Statement made up in pursuance of rule four of the rules in admiralty of the United States Circuit Court of Appeals for the Ninth Cir-

cuit, constitute the Apostles upon the Appeal of Onirato Chappi herein, in accordance with the said rule four of the rules in admiralty of the United States Circuit Court [98] of Appeals for the Ninth Circuit, and with the Praecipe for Preparation of Transcript filed in my office on behalf of the appellant by his proctor of record.

I DO FURTHER CERTIFY, that the cost of the foregoing Apostles on Appeal is \$48.20, the amount whereof has been paid me by Onirato Chappi, the appellant.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court of the United States of America, in and for the Southern District of California, Southern Division, this 23d day of November, in the year of our Lord, one thousand nine hundred and fifteen, and of our Independence the one hundred and fortieth.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By Leslie S. Colyer,
Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled 11/23/15. L. S. C.] [99]

[Endorsed]: No. 2689. United States Circuit Court of Appeals for the Ninth Circuit. Onerato Chappi, Owner of the Gasoline Boat "Noe G," Appellant, vs. M. Costa, Joe H. Costa and John Silva,

Appellees. Apostles on Appeal. Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed November 29, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

**[Order Granting Appellant 60 Days' Additional
Time to File Apostles on Appeal.]**

*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

ONERATO CHAPPI,

Claimant, Appellant,

vs.

M. COSTA, JOE H. COSTA and JOHN SILVA,
Appellees.

Good cause appearing therefor, it is hereby ordered that said appellant may have and is hereby given sixty (60) days from and after the expiration of the time given therefor by rule 5 of rules in admiralty, United States Circuit Court of Appeals for the Ninth Circuit, within which time to file the apostles in the above-entitled proceeding in the clerk's office of said Court of Appeals.

Dated this 7th day of June, 1915.

OSCAR A. TRIPPET,

Judge.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Onerato Chappi vs. M. Costa et al. Order Extending Time to File Record. Filed Sep. 7, 1915. F. D. Monckton, Clerk.

[Order Granting Appellant 60 Days' Additional Time to File Apostles on Appeal.]

In the United States Circuit Court of Appeals for the Ninth Circuit.

ONERATO CHAPPI,

Claimant, Appellant,

vs.

M. COSTA, JOE H. COSTA and JOHN SILVA,
Appellees.

Good cause appearing therefor, it is hereby ordered that said appellant may have and is hereby given sixty (60) days from and after the expiration of the time heretofore given, within which to file the apostles in the above-entitled proceeding in the clerk's office of the United States Circuit Court of Appeals, for the Ninth Circuit.

Los Angeles, California, July 31st, 1915.

OSCAR A. TRIPPET,

United States District Judge, Southern District of California.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Onerato Chappi vs. M. Costa et al. Order Extending Time to File Record. Filed Sep. 7, 1915. F. D. Monckton, Clerk.

**[Order Granting Appellant 60 Days' Additional
Time to File Apostles on Appeal.]**

*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

ONERATO CHAPPI,

Claimant, Appellant,

vs.

M. COSTA, JOE H. COSTA and JOHN SILVA,
Appellees.

Good cause appearing therefor, it is hereby ordered that said appellant may have and is hereby given sixty (60) days from and after the expiration of the time heretofore given, within which to file the apostles in the above-entitled proceeding in the clerk's office of the United States Circuit Court of Appeals, for the Ninth Circuit.

Los Angeles, California, Sept. 29, 1915.

OSCAR A. TRIPPET,

Judge.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Onerato Chappi, Appellant, vs. M. Costa et al., Appellees. Order Extending Time to File Record. Filed Oct. 7, 1915. F. D. Monckton, Clerk.

No. 2689. United States Circuit Court of Appeals for the Ninth Circuit. Three Orders Under Rule 16 Enlarging Time to Nov. 29, 1915, to File Record Thereof and to Docket Case. Refiled Nov. 29, 1915. F. D. Monckton, Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

M. COSTA, JOE H. COSTA AND JOHN SILVA,
Libellants and Respondents,

VS.

GASOLINE POWER BOAT "NOE G.",
Defendant and Appellant.

Appeal from the District Court of the United States of America
in and for the Southern District of California.

Hon. Oscar A. Trippet, Judge of the
United States District Court.

**Defendant and Appellant's Points
and Authorities**

CHARLES C. CROUCH,
CLAUDE L. CHAMBERS,

Rooms 313-316, Owl Building San Diego, California
Proctors for Defendant and Appellant

MARKS P. MOSSHOLDER,
C. G. SELLECK,

Room 5, First Nat'l Bank Bldg., San Diego, California
Proctors for Libellants and Respondents.

Filed this *day of January, 1916*

....., *Clerk*

By *Deputy*

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

No. 2689.

M. COSTA, JOE H. COSTA AND JOHN SILVA,
Libellants and Respondents,

VS.

GASOLINE POWER BOAT "NOE G.",
Defendant and Appellant.

Defendant and Appellant's Points and Authorities

PRELIMINARY STATEMENT

This case was tried to the court and a judgment rendered in favor of the Libellants and Respondents herein for the sum of One Thousand, Two Hundred and Fifty Dollars (\$1250.00) on the theory that each vessel was at fault, and each should bear one-half of the loss.

The case arose over a collision between the gasoline power goat Noe G. owned and operated by Onerati Chappi, and the gasoline power boat L'Etruria, owned and operated by M. Costa, Joe H. Costa and John Silva, off the coast of Baja California, Mexico, between Santa Tomas and China Points on the 3rd day of November, 1914, at about 7:45 o'clock A. M. The evidence in the case clearly discloses, and it is admitted by both parties to the action, that the L'Etruria was traveling in a south-

erly direction, and that the Noe G. was traveling in a northerly direction at the time the collision occurred, and that at the time of the collision, and for some time prior thereto, there had been a heavy fog.

ARGUMENT.

I.

The court found in addition to the fact that at the time of the collision, and for some time prior thereto, that both boats had been running in a fog, and that the gasoline power boat L'Etruria had not been blowing her fog horn; that the lookout on the L'Etruria sighted the Noe G. when the two boats were from forty to fifty feet apart; that the said Noe G. was dead ahead of and on a course bearing directly to the L'Etruria; that at the time the lookout on the L'Etruria sighted the Noe G., he immediately ported his helm and went to starboard.

II.

That the Noe G. did not sight the L'Etruria until she was from within ten to fifteen feet of the said L'Etruria, and that had the lookout been properly manned and attending to his duties, he could have made out the L'Etruria when she was at least forty or fifty feet distant; that the said Noe G. held her course and did not go to starboard after she sighted the L'Etruria, striking the L'Etruria on her port bow just forward of the chain plate, breaking a large hole in said L'Etruria through which the sea entered so rapidly that within a few minutes after the said collision, the said L'Etruria sank, together with her engine, tackle, apparel, etc., and that Libellants and Respondents were damaged through the

loss of the L'Etruria, her engine, tackle, apparel, furniture, etc., in the sum of Twenty-five Hundred Dollars (\$2500.00); that the Noe G. was not damaged.

As Conclusions of Law from the aforesaid Findings of Fact, the Court found

First: That the L'Etruria was negligent in not blowing her fog horn prior to the collision,

Second: That the Noe G. was negligent in not keeping a proper and sufficient lookout and in not going to starboard when she sighted the L'Etruria.

These purported Conclusions of Law, we respectfully urge are not Conclusions of Law but Findings of Fact, and we treat them herein accordingly, and counsel respectfully urge that these Findings of Fact are insufficient to support the judgment.

That the court erred in rendering judgment for the plaintiff on the facts found, and that it was conclusively shown by the evidence that Libellants and Respondents have no cause of action;

That the evidence is wholly insufficient to sustain any findings of negligence on the part of the owners or operators of the libelled gasoline power boat Noe G. at, or before, the happening of the collision.

Further, that the evidence in the case does not warrant a finding that Defendant and Appellant was guilty of negligence.

Further, that if there was any act committed by Defendant and Appellant that was erroneous, or that might be contended to be a negligent act on the part of Defendant and Appellant, that it was a minor fault, and that if they committed an error in the management and

operation of the said power boat, that it was an *error in extremis* committed in a moment of impending peril in order to avoid a catastrophe made imminent by the mismanagement of those in charge of the L'Etruria.

Further, that the evidence clearly shows that the L'Etruria was guilty of gross negligence, and that such gross negligence on the part of the L'Etruria and her crew was the direct cause of the injury.

We respectfully submit that in this case, an attempt is made to saddle on the power boat Noe G. and her owner a liability for an accident caused by the gross negligence and carelessness of the L'Etruria and her crew; that the Noe G. was not guilty of an act or omission which could be truthfully said to be the direct cause of the injury; that the Noe G. had violated no rule of the road or regulation pertaining to the operation and control of vessels upon the high seas, but that the owners and operators of the L'Etruria, according to the testimony of their own witness, were violating several of the rules of the road in reference to the management and operation of vessels upon the high seas:

First: In operating their vessel in foggy weather without providing and operating a horn and whistle, or making any alarm sufficient to notify other vessels of their approach or proximity.

Second: By not having a proper lookout properly attending to his duties.

Third: By running their vessel at a greater rate of speed than the rules for the management of vessels upon the high seas in times of fog provide.

And further, we submit to this Honorable Court that

the preponderance of the evidence in this case shows that just prior to, and at the time of the collision, no member of the crew of the L'Etruria was at the wheel attending to his duties. The evidence conclusively shows, in our opinion, that a man competent and skilled was at the wheel of the Noe G.; that another man competent and skilled was acting as lookout and assisting in sounding an alarm to warn other vessels of their approach by operating a fog horn; that the Noe G. was proceeding at a moderate rate of speed not to exceed three miles per hour; that the man at the wheel of the Noe G. discovered the L'Etruria when she was distant something like forty to fifty feet; that the lookout also discovered the L'Etruria at about the same time, or possibly an instant later, than she was discovered by the man at the wheel; that the man at the wheel of the Noe G. immediately took what he deemed under the circumstances to be proper means of avoiding a collision, which he realized was imminent, and that everything was done by the crew of the Noe G. that was required of them, or would be required of a reasonable and cautious crew, to prevent an accident.

We will first take up the question of what was done by the man who was supposedly at the wheel of the L'Etruria in reference to the finding that the lookout on the L'Etruria when he sighted the Noe G. immediately ported his helm and went to starboard, and call the Court's attention to the testimony of J. H. Costa who was claimed by Libellants and Respondents to have been at the wheel of the L'Etruria at the time of the collision. Reading from Page 3 of the Transcript, commencing at Line 17:

“Q. When you first saw the Noe G. what did you do, if anything?

A. I tried to turn to the right—the right hand side.

Q. How far to the right did you turn? What is the trouble?

A. He says he was going south. I am trying to ask him what distance when he saw the Noe G.—what distance he went out of his course, and he says he went south.

Q. Ask him how much to the right he went, not out of his course, but how much to the right he went.

A. He says at least fifteen feet.

The Court. Went to the right fifteen feet before he struck?

A. He says about that.

The Court. That is, he went fifteen feet out of the course. Is that what he means?

A. Yes, sir. He saw the boat and turned the rudder and he turned about fifteen feet out of his course.”

Also call the Court’s attention to the testimony of this same witness on Page 3 of the Transcript at line 9:

“*The Court.* How far apart were they when he saw it?

A. About 50 feet.”

Also, to the testimony of the same witness, page 5 of the Transcript, line 23:

“Q. How fast was the L’Etruria traveling?

A. He says, about seven or seven and a half miles an hour.”

This testimony, we respectfully urge is not worthy of consideration, for the reason that it was an impossible performance to have turned his boat fifteen feet out of its course in a distance of fifty feet, the boat traveling at the rate of speed of seven to seven and one-half miles per hour, as testified by this witness. This is all the testimony on the part of Libellants and Respondents tending in any way to support this finding.

In contradiction of this, we have the testimony of Appellant's witness Oscar Peuna that when he first saw the L'Etruria she was ten or fifteen feet from the Noe G., his attention having been called to it by the cry of alarm by the man at the wheel of the Noe G., page 20 of the Transcript commencing at line 26:

"Q. How far away was the L'Etruria when you first saw it?

A. About ten or fifteen feet.

The Court. Ten or fifteen feet?

A. When he saw it first.

The Court. Ten or fifteen feet apart?

A. Yes.

The Court. And who called his attention to it?

A. The man that was on the watch."

Page 21 of the Transcript commencing at Line 10, quoting same witness:

"*The Court.* They were only about ten feet apart then?

A. Yes, sir, about ten or fifteen feet apart.

Q. Which way was the L'Etruria headed?

A. The L'Etruria was going south.

Q. Did the L'Etruria change her course after you first saw her?

A. No, sir.

Q. Did you see anybody on the L'Etruria at that time?

A. I didn't see nobody."

Page 24 of the Transcript, commencing at Line 11, quoting from the testimony of the same witness:

"Q. And the L'Etruria did not change her course at all?

A. I don't think so, because I didn't see nobody on deck."

Dosa Peo Pela, another of Appellant's witnesses, testifies as follows:

Page 31 of the Transcript, commencing at Line 6:

"Q. When did you first see the L'Etruria?

A. He says, I was about forty feet when I saw it first, and he hollered that there was a boat ahead of them, and he told another fellow to reverse the engine at full speed.

Q. Did you see anybody on the L'Etruria when you first saw it?

A. He says, not before they came to a collision. The only thing he saw after they came together one from out from the cabin with a cigarette paper in his hand.

Q. What part of the boat did he come from?

A. From the cabin of the boat, from his engine.

Q. Was he smoking that cigarette?

A. No, he was holding these papers in his hand to make cigarettes.

Q. Who was that man?

A. He says only he knew him by sight. It was the brother of the fellow that owned the boat."

Page 32 of the Transcript, commencing at Line 9, quoting from the same witness:

"Q. Did the L'Etruria change its course after you saw them when they were forty feet away?

A. No, sir."

Page 33 of the transcript, commencing at Line 14, cross-examination of the same witness:

"Q. If Mr. Peuna says that the L'Etruria was between ten to fifteen feet away when you first saw her, he was mistaken, wasn't he?

Mr. Chambers. We object that Mr. Peuna did not say that he was in the same position that this witness was.

The Court. Translate the question and ask it.

A. He says—when I saw the boat it was about forty feet but to reverse the engine, and they were still going ahead when the rest of them saw it. Perhaps it was that time when they saw it. But we saw it before anybody else saw it."

Antonio Levaro, another of Appellant's witnesses, testified as follows:

Page 41 of the Transcript, commencing at Line 9.

"Q. How far was the L'Etruria from the Noe G. when you first saw it?

A. He said it was about forty feet."

Page 42 of the Transcript, commencing at Line 24, quoting from the same witness:

"Q. Did the L'Etruria change her course after you first saw her?

A. No, he said straight ahead without nobody on deck."

Page 47 of the Transcript, commencing at Line 7, quoting from the same witness:

"Q. Did the L'Etruria change its course after you saw it?

A. It was going straight ahead."

Noe Chappi, another of Appellant's witnesses, testified as follows:

Page 50 of the Transcript, commencing at Line 15.

"Q. Could you see whether there was anybody at the wheel of the L'Etruria from where you were?

A. He said, he couldn't see no one. He said they had a glass but if there was, he could see them.

Q. If there was anyone there, you could see them?

A. Yes.

Q. Was there anyone there at the wheel when you looked up?

A. No, I didn't see nobody.

Q. When did you first see anybody on the L'Etruria?

A. When we came in collision he saw the fellow come down with a cigarette paper in his hand."

Gerald Brigante, another of Appellant's witnesses, testified as follows:

Page 56 of the Transcript, commencing at Line 17:

"Q. He stated to you at that time there was no one on deck of the L'Etruria?

A. He said there was nobody on the deck.

Q. What was it he said about his brother rolling this cigarette?

A. He said, my brother was down in the hold making a cigarette for himself. That is all he said. He didn't give me any of the other information at all."

Page 58 of the Transcript, commencing at Line 11, quoting from the same witness:

"Q. What did he say?

A. I said, 'Did you see that, the boat Noe G. when she came against you?' And he said, 'No, I was below sleeping.' I said, 'Who was on guard when that came?' He said, 'My brother was on the road,' but he said, 'Just that minute he was in the hold making a cigarette for himself,' and that is all, and he said, to me, Well, I see the man was very sorry, and he says, 'I wish I sunk with the boat myself.' He means to say that he was very sorry. He didn't say nothing else."

This testimony, we respectfully urge, disposes of the question of the finding that at the time the lookout on the L'Etruria sighted the Noe G. he immediately ported his helm and went to starboard.

We will next take up the finding that the Noe G. did not sight the L'Etruria until she was within from ten to fifteen feet of the said L'Etruria. That had the lookout been properly manned and attending to his duties, he could have made out the L'Etruria when she was at least forty to fifty feet distant, and we respectfully urge that the evidence shows that the Noe G. had a lookout stationed at his proper place and in the discharge of his

duties, and that said finding is erroneous, and call the Court's attention to the testimony of Oscar Peuna, page 26 of the Transcript, commencing Line 23:

"The Court. Who else was on deck beside the lookout and you?

A. Antonio Levaro.

The Court. Where was he?

A. Just one side of the man that was steering the boat.

The Court. And he was standing near the wheel, what was he doing at the time?

A. I was cleaning fish. He was sounding the whistle and giving an alarm.

The Court. Go ahead.

Q. You say they had been sounding the fog horn ever since the fog first settled down?

A. From the time we started, because it was foggy when we left.

Q. What kind of a horn was it?

A. It was a steam whistle from the steam engine.

Q. How often was he sounding it?

A. In the neighborhood of two minutes, or probably two and a half.

Q. Did he have anything to go by?

A. No, I was cleaning fish, but the man that was managing that had a watch alongside of him."

Dosa Pco Pela, another of Appellant's witnesses, testifies as follows:

Page 31 of the Transcript, commencing at Line 3.

"Q. Who blew the whistle?

A. He says he blows the whistle himself at first, and the other, Antonio Levaro he says he was blowing the horn."

Antonio Levaro, another of Appellant's witnesses, testifies as follows:

Page 42 of the Transcript, commencing at Line 27.

"The Court. Where were you standing with reference to the man at the wheel?

A. He said he was standing about four feet from the man that was on the wheel.

Q. On which side?

A. The left side of the boat. The port side.

Q. Which way were you looking?

A. He said I was looking in every direction.

By the Court. Q. How comes it that you did not see the L'Etruria first?

A. He says that the man on the wheel saw it first.

Q. Was it plain to be seen when you saw it?

A. Not very well, it was so foggy."

We will now take up the question of the finding that the Noe G. was negligent in not going to starboard when she sighted the L'Etruria, and we respectfully submit that the evidence is insufficient upon which to base such a Finding of Fact, and that the evidence clearly discloses that on account of the gross negligence on the part of the crew of the L'Etruria in carelessly and negligently operating said vessel, placed herself by her own carelessness and wrong maneuvering in a position where the accident was inadvertible, and that the crew of the Noe G. did everything that a reasonable, prudent

and cautious crew should, or could have done under the circumstances to prevent an accident. In support of this contention, we call attention to the testimony of J. H. Costa, Libellants' own witness, page 3 of the Transcript, commencing at Line 6:

“Q. Where was the Noe G. with reference to the L'Etruria, in front or on one side?

A. He says it was coming right straight for him.

The Court. How far apart were they when he saw it?

A. About fifty feet.

The Court. Was there a dense fog at that time?

A. Yes, sir.”

Testimony of the same witness, page 5 of the Transcript, commencing at Line 23:

“Q. How fast was the L'Etruria traveling?

A. He says about seven or seven and one-half miles an hour.”

Testimony of the same witness, page 6 of the Transcript, commencing at Line 24:

“*The Court.* How long was the L'Etruria?

A. Thirty-eight feet.”

Testimony of the same witness, page 8 of the Transcript, commencing at Line 16:

“Q. I believe you stated you were the only man on the deck of the boat.

The Court. He claims he was the only man on deck.

Q. Ask him if he had been sounding this whistle or horn before this accident occurred?

A. No sir.

Q. Ask him if he had been making any kind of signal to attract the attention of other boats before this accident occurred?

A. No sir."

Testimony of J. T. Silva, one of Libellant's witnesses, page 18 of the Transcript, commencing at Line 12.

"Q. Where were you at the time of the accident?

A. Down in the hold.

The Court. Was he asleep?

A. Yes, sir."

Testimony of Oscar Peuna, Appellant's witness, cross-examination, page 23 of the Transcript commencing at Line 23:

"Q. Did the Noe G. alter its course from the time the lookout said there was a boat in front until the boats struck?

A. He couldn't change the course, it was too close, but he reversed the engine."

Same witness, page 24 of Transcript commencing at Line 5:

"*The Court.* Did he say they had changed their course?

A. They tried to. They changed the course a little, but didn't change it much. It was too close. They had no time to change it."

Same witness, page 28 of the Transcript, commencing at Line 11:

"Q. The Noe G. was going full speed ahead?

A. On account of the foggy weather, I should

judge it was going about three miles and a half an hour.

Q. What did you mean by saying a while ago it was going ahead then?

A. I mean, we reversed full speed reverse when we seen the other boat. We reversed full speed back."

Testimony of Appellant's witness Doso Peo Pela, page 32 of the Transcript, commencing at Line 23:

"Q. Noe Chappi—did you say anything to Mr. Chappi when you saw the L'Etruria ahead of you?

A. He said—as soon as I saw him, I saw the boat, I told Chappi to reverse the engine full speed.

Q. Did he reverse the engine?

A. Yes."

Same witness, page 33 of the Transcript, commencing at Line 24:

"*The Court.* Did you say anything when you saw the ship ahead—when you saw the L'Etruria?

A. As soon as I saw the boat, I ordered the Noe G. to reverse the engine, and he said it wasn't anywhere that they could give them any side, they were steering right straight they were so close.

Q. What did you do when you saw the L'Etruria?

A. He says, I was hollering that boat is ahead of us to reverse the engine, and so they did, the other party on their boat, so they were going backwards, and their boat came ahead square on the bow without nobody was on the deck.

The Court. Was your boat going backwards when the collision occurred?

A. Yes, sir.

The Court. Do you mean that the engine was going backward, or the boat going backward?

A. He said that the engine was turning backward, and also the boat was going backward.

The Court. The speed forward then was entirely stopped and the ship was moving backward when the collision occurred?

A. He says we were standing, we were going backward when the other boat came right on us.

The Court. How far were your ships apart when your ship stopped going forward?

A. About fifteen feet, but the other boat was going at full speed.

The Court. How fast was your ship going when you saw the L'Etruria?

A. He said they were going at lowest speed from two miles to three miles an hour."

Page 38 of the Transcript, same witness, commencing at Line 12:

"Q. Ask him if he had put his wheel hard over to port, and went to starboard, if he would not have cleared the L'Etruria entirely.

A. He said that it was close, that he couldn't, it wouldn't no good, it was too late."

Appellant's witness Antonio Levaro also testifies as follows, page 41 of the Transcript, commencing at Line 9:

"Q. How far was the L'Etruria from the Noe G. when you first saw it?

A. He said it was about forty feet.

The Court. Who saw it first?

A. The fellow that was on the wheel.

The Court. What did he say?

A. He said, I hollered loud there was a boat ahead of him.

The Court. Tell the words he said.

A. He was hollering aloud, "The boat is ahead, to reverse the engine."

Q. The man at the wheel hollered there was a boat ahead to reverse the engine?

A. Yes, sir.

Q. Who was running the engine at that time?

A. Noe Chappi.

Q. Did he reverse the engine?

A. Yes, sir, right away."

Same witness, page 46 of the Transcript, commencing at Line 28:

"Q. Did the Noe G. change her course at all from the time you first saw the L'Etruria until the two boats struck?

A. He said he was so close we tried to save them, but we were too late.

Q. Did they change their course?

A. He said, it was too late it was all we could do was to reverse the engine and go backward."

Testimony of Noe Chappi, page 48 of the Transcript, commencing at Line 12:

"Q. What were you doing that morning at the time of this accident?

A. He said, he was in the engine room oiling up the engine, and the fellow was at the wheel, he

hollered a boat was in ahead of him, to reverse the engine, so he reversed the engine at full speed.

Q. Who was the fellow who hollered for him to reverse the engine?

A. The man who was at the end, Peo Pela.

Q. Did you reverse the engine?

A. He said as soon as he say it, he reversed the engine right away.

Q. How fast was the Noe G. traveling at the time he called out to you to reverse the engine?

A. About 3 miles.

Q. How far did the Noe G. go after you reversed the engine and the boat stopped and started backwards?

A. From five to six feet.

Q. At the time the collision occurred, was the Noe G. going back wards or ahead?

A. Going backward."

Same witness, page 50 of the Transcript, commencing at Line 1:

"Q. How far was the L'Etruria from the Noe G. when you first saw it?

A. It was about from thirty to forty feet.

Q. Could you see the L'Etruria from where you were working from the engine room?

A. He says as soon as the man on the wheel told me to reverse the engine, I did, I reversed the engine right away, and he jumped up so he could see, and he was about thirty feet off from the L'Etruria."

Same witness, page 53 of the Transcript, commencing at Line 9:

“Q. When you got out and saw the ship, did you think they were about 30 feet apart, or about 20? Were you still going backward?”

A. He says we were going so slow when I reversed the engine, we were going backward when I got out on the deck.

Q. When you got out on the deck, you were going backwards?

A. Yes, sir.

Q. You were going backwards at full speed?

A. Yes, sir.

Q. You were going forward on slow speed?

A. We were going at first slow from $2\frac{1}{2}$ to 3 miles.

Q. How fast were you going backwards when the collision occurred?

A. He says he can't tell the speed going backwards, but the average the boat goes is six miles an hour or seven.”

Defendant and Appellant further contend that they violated no duty which they owed to Libellants and Respondents. In support of this contention, we call the Court's attention to Vol. 3 of the Encyclopedia of the United States Supreme Court Reports by Michie, page 876:

“*First:* LIABILITY FOR COLLISION AS DEPENDENT ON NEGLIGENCE.

A. *In General.* The liability of one vessel for loss of, or damage to another by collision is dependent on the questions where the owner has provided a competent and sufficient force to man the vessel,

and whether those in charge of it at the time of the accident were guilty of negligence, and if neither the owner nor the master and crew were blamable, no liability attaches to them or the vessel.

Brig James Gray vs. Ship John Frazer, 21 How. 184-194, 16 L. Ed. 106;

Sturgis vs. Boyer, 24 How. 110-124, 16 L. Ed. 591;

The Grace Girdler, 7 Wall., 196-203, 19 L. Ed. 113.

“B. *Care Required to Avoid Collision.* The highest degree of caution that can be used is not required to be exercised by those in charge of a vessel in order to avoid collision. It is enough that the care exercised is reasonable under the circumstances such as is usual in similar cases, and has been found by long experience to be sufficient to answer the end in view—the safety of life and property. That one of the vessels could have done something that she did not do is not sufficient to render her liable for a collision, the question being whether she did all that reasonable prudence required her to do under the circumstances.”

The Nevada, 106 U. S. 154-157, 27 L. Ed. 149;

Goslee vs. Shute, 18 How. 463, 15 L. Ed. 462;

Wilson vs. Barrett, 13 How. 101-108, 14 L. Ed. 68.

It is further contended by Appellant that if the Court should find that the reversing of the engine on the *Noe G.* was a mistake, that it would not even then constitute negligence on the part of the *Noe G.* but would simply

be as deemed by our courts an error in extremis, and that Libellants and Respondents would not be entitled to damages by reason of the same, and we cite in support of this contention, Encyclopedia of the United States Supreme Court Reports, Vol. 3, page 880, *Errors in extremis*.

Where one ship has by wrong maneuvers placed another in a position of extreme danger, such other will not be held to blame if she has done something wrong and has not been maneuvered with perfect skill and presence of mind.

The Bluejacket, 144 U. S. 371, 36 L. Ed. 469;
The Benefactor, 102 U. S. 214, 216, 26 L. Ed. 157;
The Elizabeth Jones, 112 U. S. 514, 28 L. Ed. 812;
The Maggie J. Smith, 123 U. S. 349, 31 L. Ed. 175;
The Ottawa, 3 Wall. 268-269, 18 L. Ed. 165;
The Propellor "Genesee Chief" vs. Fitzhugh, 12 How. 443-460, 13 L. Ed. 1058;
The City of New York, 147 U. S. 72, 37 L. Ed. 84;
City of Paris, 9 Wall. 634-638, 19 L. Ed. 751;
The Grace Girdler, 7 Wall. 196, 19 L. Ed. 113;
The Delaware, 161 U. S. 459-470, and a score of other cases holding the same.

Mistakes committed in moments of impending peril by a vessel in order to avoid a catastrophe made imminent by the mismanagement of those in charge of another vessel do not give the latter, if sunk and lost, a claim on the former for any damages.

The Nichols, 7 Wall. 656-677, 19 L. Ed. 157;
The Dexter, 23 Wall. 69, 23 L. Ed. 84.

"A mistake by a vessel in changing or keeping

her course, the failure of a steam vessel to slacken speed, stop and reverse, or hailing an approaching vessel instead of ringing the bell as required by the sailing rules, where collision is imminent owing to the fault of the other vessel, are errors in extremis and not attributable to the former vessel as a fault." Encyclopedia of U. S. Supreme Court Reports, Vol. 3, page 881.

"Right to Rely on Performance of Duty. The officers and crew of every vessel have the right to assume that others will do their duty under the rules of navigation and to act upon that assumption.

"When Rules to Prevent Collision are Applicable. The rules of navigation are obligatory upon vessels approaching each other from the time the necessity for precaution becomes and continues to be applicable as the vessels advance so long as the means and opportunity to avoid danger remain. They are not strictly applied to a vessel which is otherwise without fault in cases where the proximity of the vessels is so close that the collision is inevitable." (Encyclopedia U. S. Supreme Court Reports, Vol. 3, page 889.)

"Presumption in Favor of One Vessel Where Fault of other is Shown. Where fault on the part of one vessel is established by uncontradicted testimony and such fault is of itself sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim and any reasonable doubt with

regard to the propriety of the conduct of such vessel should be resolved in its favor.”

The Umbria, 166 U. S. 404, 4 L. Ed. 1053;
The Ludwig Holberg, 157 U. S. 60, 39 L. Ed. 620;
The Victory, 168 U. S. 410-423, 42 L. Ed. 519;
The Oregon, 158 U. S. 186, 39 L. Ed. 943;
The City of New York, 147 U. S. 72-85, 37 L. Ed. 84.

The recognized doctrine is thus stated by Mr. Justice Brown in *The Umbria*, 166 U. S. 404-409, 41 L. Ed. 1053. “Indeed, so gross was the fault of *The Umbria* in this connection that we should unhesitatingly apply the rule laid down in *The City of New York*, 147 U. S. 72, 37 L. Ed. 84, and the *Ludwig Holberg*, 157 U. S. 60, 39 L. Ed. 620, that any doubts regarding the management of the other vessel, of the contribution of her faults, if any, to the collision should be resolved in her favor.” *The Victory*, 168 U. S. 410-423, 42 L. Ed. 519. Where one vessel clearly shown to have been guilty of a fault, adequate in itself to account for the collision, seeks to impugn the management of the other vessel, there is a presumption in favor of the latter which can only be rebutted by clear proof of a contributing fault.

City of New York, 147 U. S. 72, 37 L. Ed. 84;
The Oregon, 158 U. S. 186-197, 39 L. Ed. 943.

“*Effect of Minor Fault of One Vessel.* And a minor fault of one vessel has been held not to make a case for division of damages where such fault bore but a little proportion to the many faults of

the other.” Encyclopedia U. S. Supreme Court Reports, Vol. 3, page 936.

The Great Republic, 23 Wall. 20, 23 L. Ed. 55.

We, therefore, respectfully submit that the judgment in the lower court should be reversed and a judgment given to Defendant and Appellant for its costs herein expended.

CHARLES C. CROUCH,

AND

CLAUDE L. CHAMBERS,

Attorneys for Defendant and Appellant.

No. 2689

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ONERATO CHAPPI, owner of the Gaso-
line Boat "NOE G",

Appellant,

VS.

M. COSTA, JOE H. COSTA and JOHN
SILVIA,

Respondents.

Respondents' Points and Authorities

Upon Appeal from the United States District Court for the
Southern District of California.

Southern Division

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CROUCH AND CHAMBERS,

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Proctors for Appellant

Filed

FEB 5 - 1916

F. D. Monckton,

Filed this *day of February, 1916*

Clerk

....., *Clerk*

By *Deputy*

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

No. 2689.

ONERATO CHAPPI, owner of the
Gasoline Boat "NOE G",
Appellant,

VS.

M. COSTA, JOE H. COSTA and
JOHN SILVIA,
Appellees.

Appellees' Points and Authorities

Appellant herein bases his appeal entirely on the proposition that the evidence does not support paragraphs four and five of the findings, which are as follows:

"Paragraph 4. That at the time of said collision and for some time prior thereto, the said boats had been running in a fog; that at the time of the collision and for some time prior thereto, the gasoline power boat L'Etruria had not been blowing her fog horn; that the lookout on the L'Etruria sighted the "Noe G" when the boats were from forty to fifty feet apart; that the said "Noe G" was dead ahead of and on a course bearing directly toward the L'Etruria; that at the time the lookout on the

L'Etruria sighted the "Noe G" he immediately ported his helm and went to starboard.

"Paragraph 5. That the "Noe G" did not sight the L'Etruria until she was within ten to fifteen feet of the said L'Etruria; that had the lookout been properly manned and attending to his duties he could have made out the L'Etruria when she was at least forty to fifty feet distant; that the said "Noe G" held her course and did not go to starboard after sighting the L'Etruria striking the L'Etruria on her port bow just forward of the chain plates, making a large hole in said L'Etruria through which the sea entered so rapidly that within a few minutes after the collision the said L'Etruria sank, together with her engines, tackle, apparel, furniture and provisions; that the gasoline power boat L'Etruria, her engines, tackle, apparel, furniture and provisions were lost; that the said libellants were damaged through the loss of the L'Etruria, her engines, tackle, apparel, furniture and provisions, in the sum of \$2500; that the "Noe G" was not damaged."

Appellant also objects to the conclusions of law and also questions whether or not they are properly conclusions of law. For the purpose of this argument respondents fail to see any necessity for going into that question. The conclusions of law objected to by appellants are as follows:

"Paragraph 2. That the "Noe G" was negligent in not keeping a proper and sufficient lookout and

in not going to starboard when she sighted the L'Etruria."

Appellants' appeal being based solely on the question of whether or not the evidence justified the findings, respondents respectfully submit that the evidence did support said findings. In support thereof, we call the Court's attention to the evidence of Oscar Peuna, Captain of the "Noe G", page 20, line 26:

"Q. How far away was the L'Etruria when you first saw it?

"A. About ten or fifteen feet.

"*The Court*: Ten or fifteen feet?

"A. When he saw it first?

"*The Court*: Ten or fifteen feet apart?

"A. Yes sir."

Appellants claim that there was no evidence to support the findings, we respectfully submit is answered by the testimony of their own witness, the Captain of the "Noe G."

We believe the rule is well settled in Appellate Courts that the findings of the trial judge will not be disturbed upon mere questions of fact unless there is found to be a decided preponderance of evidence to the contrary.

The Fin MacCool, 147 Fed., 123;

The Ludwig Holberg, 43 Fed., 117;

The City of Cleveland, 90 Fed., 431;

The Maggie P., 25 Fed., 202;

The Albany, 48 Fed., 565,

and many other cases.

That the Court below was justified in finding that the evidence given by Captain Peuna was correct and that

that of the other members of the crew should be discredited, we respectfully submit is borne out even by the evidence as shown by the transcript and, in addition to this evidence, the Court below, of course, had an opportunity to observe the witnesses on the stand, their manner, attitude, etc. In support of our contention that the evidence of Dosa Peopela, Antonio Levero, and Noe Chappi is not entitled to any consideration, we call the Court's attention to the fact that everyone of these men testified to having seen practically the same thing at the same time, regardless of where the individual might have been at the time of the accident, and the further fact that they all claim to have been in a position to see what was done.

The testitmony of Dosa Peopela in that regard is as follows (page 31, line6):

"Q. When did you first see the L'Etruria?

"A. He says I was about forty feet when I saw it first and he hollered that there was a boat ahead of them and he told the other fellows to reverse the engine at full speed."

The testimony of Antonio Levera on that point was as follows (page 41, line 9):

"Q. How far was the L'Etruria from the "Noe G" when you first saw it?

"A. He said it was about forty feet."

The testimony of Noe Chappi (p. 50, line 1), is as follows:

"Q. How far was the L'Etruria from the "Noe G" when you first saw it?

"A. It was about from 30 to forty feet."

And on page 52, line 21,

“Q. Were you the engineer?”

“A. Yes.

“Q. How long had you been down at the engine?”

“A. He said it was about six or seven minutes. He said he went to oil up the engine.”

Line 27,

“Q. How far is the engine from the door of the cabin?”

“A. About two feet distant from the wheel to the engine.

“Q. How far would he have to go from the engine back to where he could get out of the cabin at the engine room?”

“A. He says about three stairs from the engine room to the deck.”

The further testimony of the three witnesses with regard to reversing the engine and backing the Noe G, that of Peopela, p. 34, line 2 is as follows:

“Q. What did you do when you saw the L'Etruria?”

“A. He says I was hollering that a boat is ahead of us, to reverse the engine, and so they did. The other party on their boat saw they were going backwards and their boat came ahead and square on the bow without nobody was on the deck.

“*The Court:* Was your boat going backward when the collision occurred?”

“A. Yes sir.

The Court: Do you mean that the engine was going backwards or the boat was going backwards?

“A. He says that the engine was turning backwards and also the boat was going backwards.”

Same witness, page 35, line 4:

“*The Court:* How far would your ship move before you can stop it when it is going a mile an hour?

“A. It could stop right away.”

On page 35, line 14,

“A. He says that when the boat was at low speed that he could stop right away.

“Q. Do you mean, then, he could reverse, he could stop immediately without moving forward at all?

“A. Yes sir.”

And on page 35, line 28:

“Q. How far backwards did you go?

“A. It was about half a minute, the other boat came on top of it so fast.

“Q. How many feet backwards did you go?

“A. He says from about 20 to 30 feet.

“Q. Did it move backwards ?

“A. From about 20 to 30 feet.”

And on line 7:

“Q. Ask him again and see if he got that right?

“A. Yes sir, he was going at high speed backwards.”

The testimony of Levera, at p. 46, line 21, is as follows:

“Q. Ask him if he has got any idea of about how far they went?

“A. He said he was going so slow that he started right backwards, going backwards right away.”

The testimony of Noe Chappi, page 48, line 24 is as follows:

“Q. How fast was the Noe G travelling at the time he called out to you to reverse the engine?

“A. About three miles.

“Q. How far did the Noe G go after you reversed the engine and the boat stopped and started backwards?

“A. From 5 to 6 feet.

“Q. At the time the collision occurred was the Noe G going backwards or ahead?

“A. Going back.”

The testimony of Harry Madruga, called on behalf of the libellants, with regard to the ability to reverse a boat of this size, was as follows (p. 69, line 16):

“Q. Are you acquainted with the Noe G?

“A. Yes sir.

Q. Will you state to the Court how far a boat of the size of the Noe G, with an engine like the Noe G has in it, would go before it could be stopped when she was reversed full speed back when she was travelling in the neighborhood of three miles an hour at the time she was reversed?

“A. I don't think it could be stopped in less than two boat lengths.”

Further, on page 70, line 3:

“Q. How long would it take to get her started backwards?

“A. When a boat is running half speed you can't throw her wide open and run her full speed in a second. You have got to go down and reach a lever, speed her up and then throw her.”

We respectfully submit that the evidence heretofore set out of these three witnesses is such as to cause a court naturally to discredit their testimony, which is, in effect, what the Court did in finding as it did. In the case of the *City of Augusta*, 80 Fed., 297, the Court said: “Where the judge below has recorded his impression that certain testimony given by witnesses in his presence was of doubtful value, his conclusions will be entitled to great weight.” We respectfully submit that this is what the Court did in finding as he did in this case.

We wish to further call the Court's attention to the fact that not only is there a conflict of testimony, but that the conflict is between appellants' own witnesses, and that the Court, in its findings as to the position of the “Noe G” at the time that the L'Etruria was first sighted, follows the testimony of one of appellants' witnesses, to-wit: that of Oscar Peuna, who was captain of the “Noe G”, as shown by the testimony on page 25, line 23, viz:

“Q. Ask him who was the captain, not who was acting as captain, who was the captain at the time of the collision?

“A. I was.

“Q. How long had you been captain of that boat?

“A. A little over a month.”

Further testimony sustaining this finding is that of Levero, p. 43, line 5, viz:

“Q. Which way were you looking?

“A. He says he was looking in every direction.

“*By the Court:* How came it that you did not see the L'Etruria first?

A. He says that the man on the wheel saw it first.”

We call the Court's attention to the testimony of Peuna, page 26, line 25:

“Q. Who was the lookout?

“A. Antonio Levera.

“*The Court:* Where was he?

“A. Just one side of the man that was steering the boat.

“*The Court:* And he was standing near the wheel, what was he doing at the time?

“A. I was skinning fish, he was sounding the whistle and giving an alarm.”

Levera is the man referred to several times in the evidence as the lookout, and we submit that this testimony of his shows conclusively that he was not attending to his duties as lookout, and that a finding of the District Court based on evidence should not be disturbed. There are many authorities holding to this effect:

The City of Naples, 69 Fed., 794;

The E. Luckenbach, 93 Fed., 841;

The Parsons, 48 Fed., 564;

The Thomas Melville, 37 Fed., 271.

In the case of *Cooper vs. The Saratoga*, 40 Fed., 509, the Court said:

“The finding of the District Court on libel for damages for collision that both vessels were in fault will not be disturbed on appeal when no new proofs are taken and the evidence was conflicting, and the finding therein turned on the creditability of witnesses who were examined in the presence of the District Judge, though the testimony seems to warrant another conclusion.”

In 1 C. J., p. 1351, sec 314, the rule is stated as follows:

“The decision of a trial court upon questions of fact based upon conflicting testimony or the creditability of witnesses examined before the Judge, is entitled to great respect and will not be reversed unless manifestly contrary to the evidence, citing many cases.”

We submit that the decision of the lower court should not be disturbed in this case, as there is certainly plenty of evidence on which the Court could base the findings objected to by appellants. However, taking their own contention, that is, that the *Noe G* sighted the *L'Etruria* when she was from 40 to 50 feet distant from the *L'Etruria*, there would have been no excuse for the “*Noe G*” not following the rules of the road which require that when boats are meeting end on, or nearly end on, each one shall go to starboard.

Fed. Stats., Ann. Vol. 2, p. 161, Art. XVIII.

There was, we contend, no such extremis as is contemplated by the cases or by the rule excusing error in extremis.

We call the Court's attention to the size of the boats in this collision. The evidence of *Peopela* in that regard was as follows, p. 34, line 28, viz:

"The Court: How big is your ship, how long is it?

"A. 38 feet.

"The Court: How wide?

"A. About 10 feet."

Further on page 6, line 24:

"The Court: How long was the *L'Etruria*?

"A. 38 feet."

The testimony with regard to the size of the boats was not questioned.

With boats of this size there would have been no difficulty in avoiding a collision had the "*Noe G*" gone to starboard, as under the rules of the road she was required to do. A shift of only a few feet in the course would have cleared the two boats and there would have been no collision. We submit that there was no necessity or reason for a departure from the rules.

In 123 U. S., p. 349, the Court said:

"Departure from rules applies only when there is some special cause rendering a departure necessary to avoid immediate danger such as the nearness of shallow water, or a concealed rock, or the approach of a third vessel, or something of that kind."

The rule, as cited in 3d Enc. of the U. S. Sup. Court Reports, p. 889, Sec. 6, is as follows:

“Rules of navigation are obligatory upon vessels approaching each other from the time the necessity of precaution begins and continues to be applicable so long as the means and opportunity to avoid the danger remain.”

The Pacific, 21 How., 372.

And it can hardly be questioned but what with boats of the size of this, had the “Noe G” gone to starboard, the collision could and would have been avoided.

The testimony shows, we believe, conclusively, that the L’Etruria did, on sighting the “Noe G”, go to starboard. The testimony of J. H. Costa in this regard was as follows, p. 3, line 17:

“Q. When you first saw the “Noe G” what did you do, if anything?

“A. I tried to turn to the right, the right hand side.”

And on line 23:

“Q. Ask him how much to the right he went, not out of his course, but how much to the right he went?

“A. He says at least 15 feet.”

And on page 4, line 4:

“Q. Ask him if he put the wheel hard down and went to starboard as far as he could?

Line 8: A. Yes; he says he tried his best.

We call the Court’s attention also to the Court’s Exhibit A, and testimony of Noe Chappi with regard thereto, p. 54, line 10:

“Q. Were the ships going that way? (Handing witness Exhibit A.)

“A. He said they were going on their course, their boat comes right over and hit on the side of the bow or pretty low; that he did not see the hole; he said they were going just about as they stand now, but when I back up where the back was it would bring the bow to the left and they came right square on us at full speed. He says there was high water and rough water. There was heavy water and when I back up it brings the bow to the left, but they came with such high speed that the side of their boat hit pretty high on their boat on the left side.”

This diagram, Exhibit A, corroborates the testimony of J. H. Costa, that he did go to starboard, and Chappi, in his answer, admits that the bow of the “Noe G” swung to port.

Costa is further corroborated by the way in which the Noe G struck the L'Etruria. The evidence shows, without question, that the “Noe G” struck the L'Etruria just forward of the chain plates. Had the two boats been meeting end on and held their course as claimed by appellants' witnesses, the “Noe G” would necessarily have struck the L'Etruria much nearer the bow. We believe that these facts, together with Chappi's testimony, fully corroborate the testimony of Costa in this regard.

We further call the Court's attention to the character of the testimony given by J. H. Costa. Mr. Costa frankly admits that he was not blowing his fog horn, as required by the rules of the road, neither does he

claim to have seen everything that happened in this collision, while, on the other hand, appellant's witnesses, all of them, seem to have seen everything that took place, if we are to rely on their testimony. They lay great stress on the speed of the "Noe G". We submit that if the "Noe G" had been making only the speed claimed, about three miles per hour, or a little less, in a sea as heavy as Mr. Chappi in his testimony just quoted claims that it was, the "Noe G" having but a very light cargo, the speed claimed would not have been sufficient to have given her steerageway.

We further submit that there was no necessity of the "Noe G" reducing her speed to three miles an hour under the conditions existing here, and that the *L'Etruria* was not negligent in running in the neighborhood of 7 miles per hour. The speed of a vessel in a fog depends entirely upon the conditions and surrounding circumstances, and we do not believe that a boat running 7 miles an hour off the coast of Baja California, on the high seas, as the evidence shows that these boats were running, where there is as little marine traffic as there is off this coast, would be negligent.

The rule with regard to vessels meeting end on is well stated in the *America* 92nd U. S. Reports, page 432, in which case the Court said:

"Except in special cases the sailing ship is required to keep her course where a steamship is approaching in such a direction as to involve risk of collision but the rule is widely different if the two ships are under steam and they are meeting end on or nearly end on, so as to involve risk of col-

lision. The requirements in that event being that the helms of both ships shall be put to port so that each may pass on the port side of the other. Steamships meeting end on, or nearly end on, should seasonably adopt the required precaution and neither can be excused from responsibility in case of omission, merely upon the ground that it was the duty of the other to have adopted the corresponding precaution at the same time." And again, from the same case, "imperative obligation is imposed upon each to comply with the rule of navigation, nor will the neglect of one excuse the other in a case where each might have prevented the disaster, as the law requires both to adopt every necessary precaution."

We respectfully submit that even under appellant's contention as to the facts in this case, and to what the evidence shows, that they were nevertheless negligent, and that they were not justified in departing from the rule with regard to meeting vessels by reversing the "Noe G".

Appellant's contention that the respondents having admitted negligence on their part, that there was but little obligation on the part of the "Noe G" to comply with the rules of the road and to do everything in their power that an ordinary prudent seaman would do in handling his boat, is not well taken.

Quoting from 3d Ency. of U. S. Supreme Court Reports, page 890, sub. 8:

"The failure of one vessel to do what she should have done under the circumstances as required by the rules of navigation, does not excuse the other

from the duty of adopting every proper precaution to avoid collision."

The New York, 175, U. S., 187;

The Albert Dumois, 177 U. S., 240,

And many other cases there cited.

The rule applicable to this case, under the contention raised by the appellants, as to what the evidence shows, we believe is well stated in 7 Cyc., 312, Sec. 2, "where the error of one vessel has exposed her to the danger of collision which was consummated by the subsequent negligence of the other, the practice in the United States has been to divide the loss."

The Queen Elizabeth, 100 Fed., 874;

The Grover, 79 Fed., 378;

The Passic, 76 Fed., 460.

And many other cases there cited, which respondent respectfully submit would cover the case even under the contention of appellants that they did sight the L'Etruria when they were some 50 feet distant.

Appellants have attempted to show from the testimony that there was no one at the wheel of the L'Etruria. J. H. Costa's testimony on this point is positive, at p. 2, line 21:

"Q. What were you doing?

"A. He says he was at the rudder."

Same witness, page 4, line 25:

"Q. Ask him if he was keeping a close lookout ahead before the accident?

"A. Yes sir."

The evidence of appellant's witnesses in this regard is all negative, Peuna testifying, on page 21, line 16:

“Q. Did you see anybody on the L'Etruria at that time?

“A. I didn't see nobody.”

That of Dosa Peopela, page 31, line 10, viz:

“Q. Did you see anybody on the L'Etruria when you first saw it?

“A. He says not before they came to a collision. The only thing he saw after they came together one came out from the cabin with a cigarette paper in his hand.”

Antonio Levera, testified as follows, on page 41, line 24:

“Q. Was there anybody on the deck of the L'Etruria when you first saw it?

“A. No sir.”

The evidence of Noe Chappi on that point was as follows, page 50, line 9:

“Q. Did you see anybody on the L'Etruria?

“A. Nobody on the deck.”

Same witness, line 15:

“Q. Could you see whether there was anybody at the wheel of the L'Etruria from where you were?

“A. He said he could not see no one, he said they had a glass, but if there was he could see them.

“Q. If there was anyone there you could see them?

“A. Yes.

“Q. Was there any one there at the wheel when you looked up?

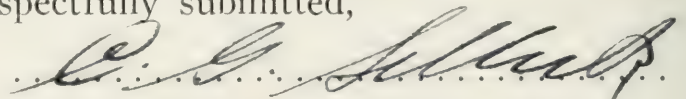
“A. No, he didn’t see nobody.”

We submit that the above testimony is entirely negative in its character and proves nothing to the Court.

The testimony of appellant’s witnesses with regard to J. H. Costa coming from the cabin, or engine room, of the L’Etruria ,with a cigarette paper in his hand is an attempt, we presume, to show that he was not attending to his duties, and we do not believe is worthy of any consideration at all, as it would be strange indeed that if Costa had a cigarette paper in his hand prior to the collision, that he would still retain it after coming on deck after the collision and stranger still that each and every one of appellant’s witnesses would have seen it in the excitement of the moment. We respectfully submit that the testimony of the three witnesses, Peopela, Levera and Chappi with regard to each and every incident connected with thits accident is so nearly identical as to arouse, by its character, grave suspicions as to when the witnesses first discovered that the facts were as testified to by them.

We therefore respectfully submit that the findings of the District Court are justified by the evidence, and that the decree entered by said Court should be by this Court confirmed and that respondent should have judgment for their costs herein expended, and for interest on the judgment rendered in the lower court at the rate of 7% per annum from the time of the rendition thereof.

Respectfully submitted,

..........

Proctor for Respondents.

United States
Circuit Court of Appeals
For the Ninth Circuit.

R. WOODLAND GATES,

Appellant,

vs.

COLUMBIA-KNICKERBOCKER TRUST COM-
PANY, a Corporation, Trustee,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the
District of Nevada.

Filed

JAN 26 1916

F. D. Monckton,
Clerk.

No. 2690

United States
Circuit Court of Appeals
For the Ninth Circuit.

R. WOODLAND GATES,

Appellant,

vs.

COLUMBIA-KNICKERBOCKER TRUST COM-
PANY, a Corporation, Trustee,

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*In the District Court of the United States for the
District of Nevada.*

JOSEPH GUTMAN et al.,

Complainants.

vs.

PACIFIC RECLAMATION COMPANY, a Corpor-
ation,

Defendant.

R. WOODLAND GATES,

Intervenor.

vs.

PACIFIC RECLAMATION COMPANY, a Cor-
poration, and GEORGE M. BACON, Receiver
Thereof,

Defendants.

Bill in Intervention [Filed July 7, 1914].

Comes now, R. Woodland Gates by his solicitors Sweeney, Morehouse & Griffin, and by leave of Court first obtained, presents this, his Bill in Intervention, and respectfully shows the Court:

I. That intervenor is a *bona fide* resident and citizen of the city of Washington in the District of Columbia.

II. That the defendant, Pacific Reclamation Company, is a corporation organized and existing under and by virtue of the laws of the State of Nevada and doing business and owning real and personal property in said State and having its principal place of business in the town of Metropolis, in the county of Elko, State of Nevada.

III. That on about the twenty-first day of March, 1913, Joseph Gutman, a judgment creditor of said corporation, Pacific Reclamation Company, together with twenty-eight (28) other creditors, or about that number, filed a bill of complaint in this court alleging that the said Pacific Reclamation Company was unable to meet its obligation as they matured; that there was grave danger of a waste of its assets and that it was threatened with numerous actions at law; that it was wholly insolvent and that the business interests of the said corporation, Pacific Reclamation Company, required the appointment of a receiver of said corporation in order to protect and conserve its property and assets—and praying that a receiver be appointed by this court for the purposes above mentioned, as well as to take possession of all of the property [1*] of said corporation and to manage, operate and control the same.

IV. That on the twenty-first day of March, 1913, the Pacific Reclamation Company, through its attorneys, filed its answer in said cause, admitting the facts set forth in the bill of complaint and joining with Joseph Gutman and others, as complainants, in their request for the appointment of such receiver.

V. That on the said twenty-first day of March, 1913, this Honorable Court did appoint George M. Bacon receiver of said Pacific Reclamation Company, a corporation, and all of its property and thereafter the said George M. Bacon duly qualified as such receiver, and ever since has been, and now is, the duly authorized, qualified and acting receiver

*Page-number appearing at foot of page of original certified Record.

of the said corporation, and by virtue of the authority vested in him by this court, has the possession, control and management of all the property, real personal and mixed, of said corporation.

VI. That between the 18th day of August, 1911, and the 1st day of March, 1913, intervenor herein, performed services as an attorney and counsellor at law for the defendant, Pacific Reclamation Company at their request, in prosecuting certain suits in the General Land Office and the Department of the Interior and in counselling and advising the defendant and in attending in and about the business of the defendant, in re,

(A) Carson City Serial No. 04408, involving relinquishments of eight (8) separate parcels of land, (B) Carson City Serial Nos. 06245, 06246, 06247, 06248, 06249, 06250, 06251 and 06252 (8 cases) involving script locations covering eight separate tracts in which cases adverse decisions were rendered by the Commissioner of the General Land Office, and appeals taken to the Secretary of the Interior (C) Carey Act Reclamation project, involving hearing before and conferences with the Department of the Interior, the Assistant Attorney General and the Interior Department, et al; and in re, Establishment of postoffice at Metropolis, Nevada.

VII. That the said services were reasonably worth the sum of twenty-five thousand (\$2,500) dollars.

VIII. That the defendant, Pacific Reclamation

Company had not paid [2] the same nor any part thereof.

IX. That intervenor, as the attorney and counsellor of said Pacific Reclamation Company, the above-named defendant in the above-entitled action, under and pursuant to the terms and provisions of paragraph 5276 of the Revised Laws of Nevada (1912) and being section 434 of "An Act to regulate proceedings in civil cases in this State and to repeal all other acts in relation thereto," has and claims a lien upon and against four hundred and eighty (480) acres of land owned by said Pacific Reclamation Company, said land being more particularly described as follows, to wit:

W. $\frac{1}{2}$ of SE. $\frac{1}{4}$, Section 26. E. $\frac{1}{2}$ of SW. $\frac{1}{4}$, Section 26. W $\frac{1}{2}$ of SW. $\frac{1}{4}$, Section 26. E. $\frac{1}{2}$ of SW. $\frac{1}{4}$, Section 26. SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Section 34. NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ Section 34. NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, Section 34. SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, Section 34. All in T. 39, N. R. 61 E. M. D. M., Nevada, in the sum of twenty-five thousand (\$25,000) dollars for and on account of services rendered by him to the said Pacific Reclamation Company in the General Land Office and the Department of the Interior of the Government of the United States from August 8th, 1911, to March 1st, 1913, as an attorney and counsellor as above referred to, and upon an agreement by the said Pacific Reclamation Company to and with the said undersigned R. Woodland Gates, to pay said R. Woodland Gates a reasonable sum for his services rendered and to be rendered in said General Land Office and Department of the Interior.

X. Intervenor further alleges that no proceedings have been had and no other action has been brought for the recovery of said sum.

Wherefore, intervenor, R. Woodland Gates, prays that he may have a judgment against the said Pacific Reclamation Company, a corporation, for the sum of twenty-five thousand (\$25,000) dollars and that he may be decreed by this Honorable Court to have a lien on the four hundred and eighty (480) acres of land, more particularly described in paragraph IX of this bill in intervention, and that he be allowed a reasonable attorney's fee and his costs in this behalf sustained.

SWEENEY, MOREHOUSE & GRIFFIN,
Solicitors for Intervenor. [3]

State of Nevada,
County of Ormsby,—ss.

William W. Griffin, being duly sworn, deposes and says that he is one of the solicitors for R. Woodland Gates intervenor in the above-entitled action, and makes this verification for and on behalf of R. Woodland Gates for the reason that the said R. Woodland Gates is not now within the State of Nevada where deponent resides. That he has read the foregoing petition in intervention, knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

WILLIAM W. GRIFFIN.

Subscribed and sworn to before me this 7th day of July, A. D. 1914.

[Seal]

JONATHAN PAYNE,

Notary Public in and for Ormsby County.

[Endorsed]: No. A-8. In the District Court of the United States for the District of Nevada. Joseph Gutman et al., Complainants, vs. Pacific Reclamation Company, a Corporation, Defendants. R. Woodland Gates, Intervenor, vs. Pacific Reclamation Company, a Corporation, Defendant. Bill in Intervention. Filed July 7, 1914. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. Sweeney, Morehouse & Griffin, Carson City, Nevada, Solicitors for Intervenor. [4]

*In the United States District Court, Ninth Circuit,
State of Nevada.*

JOSEPH GUTMAN, et al.,

Complainants,

vs.

PACIFIC RECLAMATION COMPANY, a Corporation,

Defendant.

LINA BADT,

Intervenor,

vs.

PACIFIC RECLAMATION COMPANY, a Corporation and GEORGE M. BACON, Receiver Thereof,

Defendants.

COLUMBIA KNICKERBOCKER TRUST COMPANY, a Corporation,

Intervenor.

R. WOODLAND GATES,

Intervenor.

vs.

PACIFIC RECLAMATION COMPANY, a Corporation and GEORGE M. BACON, Receiver Thereof,

Defendants.

Affidavit of Service [of Notice of Motion to Strike, etc.].

State of Utah,

County of Salt Lake,—ss.

R. E. Mark, being first duly sworn, on oath says; That on Tuesday, the 21st day of July, A. D. 1914, at Salt Lake City and County, Utah, he deposited in the United States Postoffice, a true and correct copy of the hereunto attached notice of motion to strike to which was attached a true and correct copy of the hereunto attached motion to strike. That said copies were enclosed in a *seal* envelope, with postage thereon fully prepaid, and said envelope addressed in legible characters on the outside thereof as follows: Messrs. Sweeney, Morehouse & Griffin, Attorneys at Law, Carson City, Nevada.

R. E. MACK.

Subscribed and sworn to before me this 21st day of July, A. D. 1914.

[Seal]

HAROLD P. FABIAN,

Notary Public. [5]

*In the United States District Court, Ninth Circuit,
State of Nevada.*

JOSEPH GUTMAN et al.,

Complainants,

vs.

PACIFIC RECLAMATION COMPANY, a Corporation,

Defendant.

LINA BADT,

Intervenor.

vs.

PACIFIC RECLAMATION COMPANY, a Corporation and GEORGE M. BACON, Receiver Thereof,

Defendants.

COLUMBIA KNICKERBOCKER TRUST COMPANY, a Corporation,

Intervenor.

R. WOODLAND GATES,

Intervenor.

vs.

PACIFIC RECLAMATION COMPANY, a Corporation and GEORGE M. BACON, Receiver thereof,

Defendants.

Notice of Motion to Strike.

To R. Woodland Gates, Intervenor Above Named,
and to Messrs Sweeney, Morehouse & Griffin,
His Solicitors:

You and each of you will please take notice that the Columbia-Knickerbocker Trust Company, intervenor above named, will, by its solicitors, Messrs. Gifford, Hobbs & Beard and Messrs. Dey, Hoppaugh & Fabin, on the 3d day of August, A. D. 1914, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard, call up for argument before the Court, the motions filed in said court, copies of which are attached hereto; said motions being motions to dismiss and strike your said complaint in intervention, and also to strike paragraph nine thereof and that part of the prayer in said complaint praying for a lien as in said paragraph nine of your bill in intervention described. upon the ground that it appears upon the face of the bill that the same is insufficient in fact to constitute a valid cause of action in equity, and that the same fails to set forth matters sufficient to entitle you to any relief against the Columbia-Knickerbocker Trust Company; said motions are made and will be based upon the records, filed and pleadings herein, and [6] upon this notice of motion.

Dated this 20th day of July, A. D. 1914.

GIFFORD, HOBBS & BEARD and
DEY, HOPPAUGH & FABIAN,

Solicitors for Intervenor, Columbia-Knickerbocker
Trust Co.

*In the United States District Court, Ninth Circuit,
State of Nevada.*

JOSEPH GUTMAN et al.,

Complainants,

vs.

PACIFIC RECLAMATION COMPANY, a Corporation,

Defendant.

LINA BADT,

Intervenor,

vs.

PACIFIC RECLAMATION COMPANY, a Corporation and GEORGE M. BACON, Receiver thereof,

Defendants.

COLUMBIA KNICKERBOCKER TRUST COMPANY, a Corporation,

Intervenor,

R. WOODLAND GATES,

Intervenor,

vs.

PACIFIC RECLAMATION COMPANY, a Corporation and GEORGE M. BACON, Receiver Thereof,

Defendants.

**Motion to Dismiss and Strike [Bill filed July 7,
1914].**

Comes now Columbia-Knickerbocker Trust Com-

pany, intervenor in the above-entitled action, by Messrs. Gifford, Hobbs & Beard and Messrs. Dey, Hoppaugh & Fabian, its solicitors, and moves to dismiss and strike from the files the complaint in intervention of R. Woodland Gates filed herein, upon the ground that it appears upon the face of the bill that the same is insufficient in fact to constitute a valid cause of action in equity, and that the allegations therein contained are insufficient to entitle the said intervenor, R. Woodland Gates, or any other person, to any relief against the Columbia-Knickerbocker Trust Company.

The said intervenor, Columbia-Knickerbocker Trust Company further moves to strike the whole of paragraph nine of said complaint in intervention and [7] that portion of the prayer in which the said intervenor, R. Woodland Gates, claims a lien on the 480 acres of land described in paragraph nine of his said complaint in intervention, upon the ground that it appears upon the face of the bill that the same is insufficient in fact to constitute a valid cause of action in equity or in any manner to entitle the said intervenor to the relief prayed for, and further that the allegations in said paragraph nine and said prayer fail to set forth matters sufficient to entitle the said intervenor, R. Woodland Gates, or any other person, to the relief prayed for, or any relief, against the Columbia-Knickerbocker Trust Company.

The foregoing motions will be made and based upon the records, files and pleadings herein.

Dated this 20th day of July, A. D. 1914.

GIFFORD, HOBBS & BEARD and
DEY, HOPPAUGH & FABIAN,
Solicitors for Intervenor, Columbia-Knickerbocker
Trust Company.

[Endorsed]:—No. A-8. U. S. Dist. Court, Dist.
Nevada. Joseph Gutman, et al. v. Pacific Reclama-
tion Co. Motion to Strike and Motion to Dismiss
the Gates Intervention.

Filed July 23d, 1914. T. J. Edwards, Clerk. [8].

**[Opinion and Order Filed October 10, 1914, Dismiss-
ing Petition in Intervention.]**

*In the District Court of the United States, in and
for the District of Nevada.*

JOSEPH GUTMAN et al.,

Complainants,

vs.

PACIFIC RECLAMATION COMPANY, a Cor-
poration,

Defendants.

R. WOODLAND GATES,

Intervenor,

vs.

PACIFIC RECLAMATION COMPANY, and
GEORGE M. BACON, Receiver Thereof,
Defendants.

The intervenor, R. Woodland Gates, having filed
herein his bill in intervention, in which he asks
judgment against the Pacific Reclamation Com-

pany for the sum of twenty-five thousand dollars, and that he be decreed by this Court to have a lien on 480 acres of land described in the bill, for services by him performed as attorney and counselor at law in prosecuting certain matters in the General Land Office and the Department of the Interior, and in counselling and advising the defendant, and in attending in and about the business of the defendant in re,

(A) Carson City Serial No. 04408, involving relinquishments of eight (8) separate parcels of land, (B) Carson City Serial Nos. 06245, 06246, 06247, 06248, 06249, 06250, 06251 and 06252 (eight cases) involving script locations covering eight separate tracts, in which cases adverse decisions were rendered by the Commissioner of the General Land Office and appeals taken to the Secretary of the Interior. (C) Carey Act Reclamation project, involving hearings before and conference with the Department of the Interior, the Assistant Attorney General for the Interior Department et al., and in re Establishment of postoffice at Metropolis, Nevada.

The lien is claimed under the provisions of paragraph 5376 of the Revised Laws of Nevada, being section 434 of the Civil Practice Act, the material portion of which reads as follows:

“The compensation of an attorney and counselor for his services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action, or the service of an

answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim which attaches to a verdict, [9] report, decision, or judgment in his client's favor and the proceeds thereof, in whosoever hands they may come, and cannot be affected by any settlement between the parties before or after judgment.

The Columbia-Knickerbocker Trust Company, also an intervener, moves to dismiss and strike out the petition in intervention, on the ground that the same is insufficient in fact to constitute a valid cause of action in equity, or to entitle R. Woodland Gates, or any other person, to any relief against the Columbia-Knickerbocker Trust Company. It further moves to strike out all that portion of the bill in which R. Woodland Gates claims a lien, on the ground that it appears upon the face of the bill that the same is insufficient in fact to constitute a valid cause of action in equity, or in any manner to entitle the intervenor to the relief prayed for, particularly as against the Columbia-Knickerbocker Trust Company.

I am clearly of the opinion that the bill fails to set out facts sufficient to entitle the intervenor to an attorney's lien, or to bring him within the provisions of the Nevada statute which he invokes, therefore the motion to dismiss is granted.

The intervenor will be allowed twenty days within which to take such steps as he may be advised.

Done in open court this 10th day of October, 1914.

E. S. FARRINGTON,

District Judge.

[Indorsed]: No. A-8. In the District Court of the United States, in and for the District of Nevada. Joseph Gutman et al., Complainants, vs. Pacific Reclamation Company, a Corporation, Defendant. R. Woodland Gates, Intervenor, v. Pacific Reclamation Company and George M. Bacon, Receiver thereof, Defendants. Order Dismissing Petition in Intervention. Filed October 10, 1914. T. J. Edwards, Clerk. [10]

*In the District Court of the United States, in and
for the District of Nevada.*

JOSEPH GUTMAN et al.,

Complainants,

vs.

PACIFIC RECLAMATION CO., a Corporation,
Defendant.

R. WOODLAND GATES,

Intervenor,

vs.

PACIFIC RECLAMATION CO., a Corporation,
and GEORGE M. BACON, Receiver thereof,
Defendants.

Bill in Intervention [Filed November 21, 1914].

Comes now R. Woodland Gates, by his solicitors, Sweeney, Morehouse & Griffin, and by leave of Court first obtained, presents this, his bill in intervention, in the above-entitled cause and respectfully represents unto the Court:

1. That intervenor is a *bona fide* resident of the city of Washington, in the District of Columbia.

II. That the defendant, the Pacific Reclamation Company, is a corporation organized and existing under and by virtue of the laws of the State of Nevada and doing business and owning real and personal property in said State and having its principal place of business in the town of Metropolis, county of Elko, State of Nevada.

III. That on or about July 21st, 1911, the said Pacific Reclamation Company, defendant herein, employed this intervenor, as its attorney and counsellor-at-law, to commence certain actions and prosecute certain suits, in behalf of said Pacific Reclamation Company, before and in the General Land Office at Washington, D. C., and to attend in and about any and all business said Pacific Reclamation Company might have before said General Land Office or the Department of the Interior, but more especially in regard to said certain suits therein about to be commenced or pending.

IV. Your intervenor further alleges that said General Land Office at [11] Washington, D. C., is a department of the Department of the Interior and is a quasi-judicial tribunal and a court of record, and that the decisions of said General Land Office and of said Department of the Interior are not subject to review by the courts.

V. That pursuant to said employment, as mentioned in paragraph III of this petition in intervention, your intervenor, on the 8th day of August, 1911, entered and filed his appearance as an attorney and counsellor at law and as attorney and counsel for the said Pacific Reclamation Company before said General Land Office.

In Re.

(A) Carson City Serial No. 04408 involving relinquishments of eight (8) separate parcels of land.

(B) Carson City Serial Nos. 06245-06246-06247-06248-06249-06250-06251-06252 — (8) eight cases, involving script locations covering eight separate tracts in which adverse decisions were rendered by the Commissioner of the General Land Office, and appeals thereafter taken to the Secretary of the Interior.

(C) Carey Act Reclamation project, involving hearings before and conferences with the Secretary of the Interior, the Assistant Attorney General and officials of said Department of the Interior.

VI. Your intervenor further represents that said employment, aforementioned, continued from the 8th day of August, 1911, until the first day of March, 1913, and that continually during said time, intervenor performed professional services in prosecuting said suits, herein referred to before said General Land Office and said Department of the Interior.

VII. Your intervenor alleges that before any action could be taken in the matter referred to in paragraph V, section (B) herein, said cases being known as the "Bacon cases," it became necessary for him to obtain action in the case known as "Carson City Serial No. 04408" heretofore referred to in paragraph V, section (A) of this petition, this particular case being the case in which relinquishments had

been made by the company of the lands located by Bacon for said company in the eight cases, above referred to. [12]

Your intervenor further states that in the said relinquishment case (Carson City Serial No. 04408) a decision had already been prepared, when your intervenor took charge of said cases, for the signature of the Commssioner of the General Land Office, holding that said land, so referred to in said Carson City Serial No. 04408, could not be relinquished—and said adverse action had to be overcome. Your intervenor further alleges, that, after much effort and labor on his part, he succeeded in preventing said decision being signed by the Commissioner, as aforesaid, and obtained, in lieu thereof, a decision accepting the relinquishments.

VIII. Your intervenor further states that after he had succeeded in getting the eight (8) Bacon cases, so-called—in position to be favorably acted upon by the Commissioner, the General Land Office was notified by its Chief of Field Division, by way of protest, that said Bacon, he being the same Bacon who is now the receiver of said Pacific Reclamation Company, being then the company's agent, was disqualified under section 452 R. S. because he was a deputy mineral surveyor. And in this connection intervenor alleges that the said section of the Revised Statutes, so referred to, is an absolute statutory prohibition against location or entry of public land by an employee of the said General Land Office, and because of said violation of said section 452, above referred to, adverse decision was rendered by

the Commissioner. A motion was thereupon made by intervenor before the Commissioner for a reconsideration in said matter but after numerous conferences and hearings said Commissioner adhered to his former ruling.

IX. Your intervenor further states that thereupon he took a separate appeal in each of said cases, so above referred to, to the Secretary of the Interior and filed many affidavits and a lengthy brief in support of said appeals; that he made various efforts to have said cases, on appeal, made "special" by the secretary and made motions in that behalf but that said motions were denied. That about October, 1912, there having been a change in the personnel of said Department of the Interior, your intervenor renewed his motions to have said cases made "special" and his motion was finally granted and thereafter, after much effort on the part of [13] intervenor and many oral and written arguments and conferences, a favorable decision was rendered by the secretary in each of the said cases, heretofore referred to in paragraph V section (B) of this petition, and known as the "Bacon cases."

Your intervenor alleges further that even after a favorable decision by the said Secretary of the Interior in the said cases many difficulties were encountered in the General Land Office, principally because of the decision of the Department in what is known as the Spaeth case in which the Department held that thereafter no approximation would be allowed in the matter of the location of soldiers' additional rights, but that notwithstanding said de-

cision your intervenor succeeded in having the said cases, heretofore referred to as the "Bacon cases," finally closed without regard to the decision of said Department in said Spaeth case.

Your intervenor further alleges that the land involved in the eight (8) townsite cases, herein referred to and known as the "Bacon cases" and more particularly described in paragraph V and section (B) of this petition aggregate 480 acres which is described as follows:

W. 1-2 of S. E. 1-4 Section 26

E. 1-2 of S. W. 1-4 Section 26

W. 1-2 of S. W. 1-4 Section 26

E. 1-2 of S. E. 1-4 Section 26

S. W. 1-4 of N. E. 1-4 Section 34

N. E. 1-4 of S. E. 1-4 Section 34

N. W. 1-4 of S. E. 1-4 Section 34

S. W. 1-4 of S. E. 1-4 Section 34

all in T. 39 N. R. 61, E. M. D., Nevada.

And your intervenor further alleges that all of said acreage and land, so above described, is now the property of the said Pacific Reclamation Company, and one of the main assets, if not the main asset, of said company; and that the judgment obtained from the Department of the Interior by and through the labor, efforts, work and skill of this intervenor alone, saved said property, so described, for and to the said Pacific Reclamation Company and that the said land was the identical land involved in the actions or action before the General Land Office and the Department of the Interior, in which intervenor appeared as counsel for said Pacific Re-

clamation Company, and without whose work and professional effort said land would have been lost to the said company. [14]

X. Your intervenor further alleges that the lands embraced in Carson City Serials, referred to in paragraph V, section (B) of this petition, compose 480 acres of the 640 acres which constitute the town of Metropolis, and that since the date of the filing of the application of said Bacon, who was acting for the said Pacific Reclamation Company and of which lands in question said Pacific Reclamation Company is the sole owner, about July 8th, 1911, as your intervenor is advised and believes and therefore states the fact to be, said company has expended upon the improvement of said town, including the said 480 acres hereinbefore referred to, and which were obtained through the professional efforts of this intervenor, between \$225,000 and \$250,000, said money having been expended for grading and laying sidewalks, building electric light and waterworks, constructing a hotel, laying out a park and making other improvements.

And your intervenor further states that he is advised and believes, and therefore charges the fact to be, that up to about the 24th day of May, 1912, more than forty buildings have been erected by citizens of said town of Metropolis, a number of which are upon said 480 acres of land, heretofore referred to; that a hotel costing approximately \$100,000 has been built by the company; that in addition to the other moneys which have been spent by the company and citizens for the benefit of the entire town, including the said

480 acres of land, said company has expended about \$22,000 on water mains which run through said 480 acres and has laid out on said acres the only park which the town contains; that a church, for which the company donated six lots has been under construction on said 480 acres and is being paid for by citizens of the town who are located upon portions of said 480 acres, heretofore referred to; that said company has expended \$2,700 for the construction on said 480 acres of a schoolhouse, which is attended by over sixty pupils.

XI. Your intervenor further alleges that the said Pacific Reclamation Company would have been greatly injured had this intervenor not been successful in the said "Bacon cases," and that not only was its great outlay in connection with the Carey project alone, amounting to several hundred thousand dollars, menaced, but its hotel and the large [15] expenditures made by it for schoolhouse and street improvements, parks, electric lights and waterworks would have been lost to said company.

XII. Your intervenor further alleges that he is advised and believes, and therefore charges the fact to be, that the said 480 acres gained by him for the company, were divided into about 3,840 lots; that according to the prospectus of the company the minimum price of lots, as advertised, is \$100 per lot and the maximum of \$1,500 per lot and placing upon the said lots the minimum valuation of \$100 per lot his labor and services have saved to the said company of \$384,000 and adding to this the value of the improvements, without considering the com-

pany's investment in its Carey Act project, the minimum value of the property involved in these so-called "Bacon cases" which was saved to the company through the efforts of this intervenor alone, can be reasonably fixed at \$500,000.

XIII. Your intervenor further alleges that he is aware that to secure the payment of certain bonds and the interest thereon, the said Pacific Reclamation Company, in pursuance of resolutions of its stockholders and directors duly adopted, on the 23d day of December, 1909, duly made, executed and delivered to the Columbia-Knickerbocker Trust Company, under its then name of Columbia Trust Company, as trustee, its certain mortgage in the form of trust deed, by which said Pacific Reclamation Company, granted, bargained, sold, assigned, transferred and conveyed unto said Columbia Trust Company and its successors and assigns, in the trust thereby created, forever all and singular the real, personal and mixed property, including all rents, issues, income, and profits of said property, situated in Elko County, State of Nevada, described in said mortgage—copy of which said mortgage is a part of the petition in intervention of the Columbia-Knickerbocker Trust Company, filed in the above-entitled cause.

XIV. And with respect to the said pretended rights of the said Knickerbocker Trust Company, trustee, intervenor alleges that at the time said trust deed was made by the said Pacific Reclamation Company to said Columbia-Knickerbocker Trust Company, said Pacific Reclamation Company was

in no wise the owner of the land involved in the so-called "Bacon cases" herein [16] referred to, and which comprise the said 480 acres of land obtained later through the labor and efforts of said intervenor for said Pacific Reclamation Company and that the rights, interests and claims of the said Columbia-Knickerbocker Trust Company, if any there be, are subject and subsequent to the lien and interest of this intervenor in the land involved in the said "Bacon cases," so-called, aggregating 480 acres, herein and heretofore described.

XV. Your intervenor admits and alleges that on or about the 21st day of March, 1913, Joseph Gutman, a judgment creditor of said corporation, Pacific Reclamation Company, together with twenty-eight other creditors or about that number, filed a bill of complaint in this court alleging that the Pacific Reclamation Company was unable to meet its obligations as they matured; that there was grave danger of a waste of its assets and that it was threatened with numerous actions at law; that it was wholly insolvent and that the business interests of said corporation, Pacific Reclamation Co., required the appointment of a receiver of said corporation in order to protect and conserve its property and assets—and praying that a receiver be appointed by the Court for the purposes, above mentioned, as well as to take possession of all of the property of said corporation and to manage, operate and control the same.

XVI. That on the 21st day of March, 1913, the Pacific Reclamation Company, through its attor-

neys, filed its answer in said cause, admitting the facts set forth in the bill of complaint and joining with Joseph Gutman and others, as complainants, in their request for the appointment of a receiver.

XVII. That on the said 21st day of March, 1913, this Honorable Court did appoint George M. Bacon, receiver of the said Pacific Reclamation Company, a corporation, and all of its property and thereafter said Bacon duly qualified as such receiver and is now the duly authorized and acting receiver of said corporation and by virtue of the authority vested in him by this court, has the possession, control and management of all the property, real, personal and mixed of said corporation.

XVIII. Your intervenor alleges that the services performed by him, as herein set forth, were reasonably worth the sum of \$25,000. [17]

XIX. That neither the defendant, the Pacific Reclamation Company nor the receiver thereof has paid any part of the same, although often requested so to do.

XX. Your intervenor further alleges that, as the attorney and counsellor of said Pacific Reclamation Company in commencing actions and prosecuting suits before the General Land Office and before the Department of Interior, and the secretary thereof, he claims and is entitled, under and pursuant to the terms and provisions of paragraph 5376 of the Revised Laws of Nevada (1912) being section 434 of "An Act to regulate proceedings" etc.—to a lien upon the 480 acres of land, heretofore particularly described and which said land was the land

involved in what is herein known as the “Bacon cases”—in the sum of \$25,000 for and on account of services performed and rendered by him for and on behalf of the Pacific Reclamation Company before the General Land Office and the Department of the Interior of the United States—said services having been more fully and particularly hereinbefore described—upon an agreement by the said Pacific Reclamation Company to and with the said R. Woodland Gates, Intervenor herein, to pay to said Gates a reasonable sum for his services rendered in said General Land Office and said Department of the Interior.

XXI. Intervenor alleges that no proceedings have been had and no other action brought for the recovery of said sum.

Wherefore, Intervenor, R. Woodland Gates, prays that he may have a judgment against the said Pacific Reclamation Company, a corporation, for the sum of *Twenty-five* (\$25,000) *Dollars* and that he may be decreed by this Honorable Court to have a lien on the 480 acres of land, heretofore more particularly described and which were saved to said Pacific Reclamation Company by the labor and industry of said intervenor—and that he be allowed a reasonable attorney’s fee and his costs in this behalf sustained.

SWEENEY, MOREHOUSE & GRIFFIN,
Solicitors for R. Woodland Gates.

State of Nevada,
County of Ormsby,—ss.

William W. Griffin, being first duly sworn, deposes

and [18] says that he is one of the attorneys for the intervenor, R. Woodland Gates, in the above-entitled cause and makes this verification for and on behalf of the said R. Woodland Gates for the reason that the said R. Woodland Gates is not now within the State of Nevada, where deponent resides.

That he has read the foregoing petition in intervention and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

WILLIAM W. GRIFFIN.

Subscribed and sworn to before me this 21st day of November, A. D. 1914.

[Seal] JAMES G. SWEENEY,
Notary Public in and for Ormsby County, Nevada.

[Indorsed]: No. A.—8. In the District Court of the United States for the District of Nevada. Joseph Gutman et al., Plaintiffs, vs. Pacific Reclamation Company, Defendant. Bill in Intervention of R. Woodland Gates. Filed November 21st, 1914. T. J. Edwards, Clerk. Sweeney, Morehouse and Griffin, Carson City, Nevada, Attorneys for R. Woodland Gates. [19]

[**Motion to Dismiss and Strike Bill Filed November
21, 1914.**]

*In the District Court of the United States, in and
for the District of Nevada.*

JOSEPH GUTMAN et al.,

Complainants,

vs.

PACIFIC RECLAMATION COMPANY, a Corpo-
ration,

Defendant.

LINA BADT,

Intervenor,

vs.

PACIFIC RECLAMATION COMPANY, a Corpo-
ration, and

GEORGE M. BACON, Receiver Thereof,

Defendants.

COLUMBIA-KNICKERBOCKER TRUST COM-
PANY, a Corporation,

Intervenor,

R. WOODLAND GATES,

Intervenor,

vs.

PACIFIC RECLAMATION COMPANY, a Corpo-
ration, and

GEORGE M. BACON, Receiver Thereof,

Defendants.

Comes now Columbia-Knickerbocker Trust Com-
pany, intervenor in the above-entitled action, by

Messrs. Gifford, Hobbs & Beard and Messrs. Dey, Hoppaugh & Fabian, its solicitors, and moves to dismiss and strike from the files herein paragraph XIV and XX of the bill in intervention of R. Woodland Gates, and also the entire bill in intervention, filed in the above-entitled cause on or about the 21st day of November, A. D. 1914, upon the following grounds, to wit:

1st. That the matters and things in said petition in intervention set forth have been heretofore adjudged and determined against said R. Woodland Gates, intervenor. That on or about the 7th day of July, A. D. 1914, the said intervenor filed a petition in intervention herein; and thereafter, on or about the 23d day of July, A. D. 1914, the said Columbia-Knickerbocker Trust Company moved to dismiss and strike from the files said petition and complaint in intervention so filed and that this Court thereafter, upon said matter being submitted on the bill in intervention and the motion to dismiss and strike, sustained said motion and dismissed and struck said petition [20] in intervention from the files, and that the judgment therein was upon the merits.

2d. The intervenor, Columbia-Knickerbocker Trust Company moves to dismiss and strike from the files paragraphs XIV and XX and that portion of the prayer in which the intervenor, R. Woodland Gates, claims a lien on 480 acres of land described in said petition in intervention, upon the ground that it appears upon the face of the bill that the same is insufficient in fact to constitute a valid cause in equity or in any manner to entitle the said inter-

venor, R. Woodland Gates, to the relief prayed for, and further that the allegations in said paragraphs of said petition in intervention and in said prayer fail to set forth matters sufficient to entitle the intervenor, R. Woodland Gates, or any other person, to the relief prayed for, or any relief against the Columbia-Knickerbocker Trust Company.

The foregoing motions will be made and based upon the records, files and pleadings herein.

Dated this 2d day of January, A. D. 1915.

GIFFORD, HOBBS & BEARD and
DEY, HOPPAUGH & FABIAN,
Solicitors for Intervenors, Columbia-Knickerbocker
Trust Co.

[Indorsed]: No. A.-8. U. S. District Court, Dist. Nevada. Joseph Gutman et al. vs. Pacific Reclamation Co. Motion to Strike Gates' Intervention. Filed January 6th, 1915. T. J. Edwards, Clerk.
[21]

**[Order Striking Certain Portions of Petition in
Intervention.]**

Minutes of Court, July 24th, 1915.

A.-8.

“JOSEPH GUTMAN et al.

vs.

PACIFIC RECLAMATION CO.

The motion of the Columbia-Knickerbocker Trust Company, intervenor herein, to strike the petition in intervention of R. Woodland Gates, having been

argued and submitted by counsel, and the same having been duly considered by the Court, it is now ordered that paragraphs 14 and 20 of the Gates petition, and also that portion of the prayer thereof in which the petitioner claims a lien on the 480 acres of land described in said paragraph 14, be, and are hereby, stricken out; and that said intervenor have twenty days' time to take such steps as advised."

[22]

[Opinion Filed July 24, 1915.]

*In the District Court of the United States, in and for
the District of Nevada.*

JOSEPH GUTMAN et al.,

Complainants,

vs.

PACIFIC RECLAMATION COMPANY, a Corporation,

Defendant,

COLUMBIA-KNICKERBOCKER TRUST COMPANY, a Corporation,

Intervenor,

R. WOODLAND GATES,

Intervenor,

vs.

PACIFIC RECLAMATION COMPANY, a Corporation, and GEORGE M. BACON, Receiver
Thereof,

Defendants.

WILLIAM W. GRIFFIN and SWEENEY &
MOREHOUSE,

For Intervenor, R. Woodland Gates.

GIFFORD, HOBBS & BEARD, DEY, HOP-
PAUGH & FABIAN,

For Intervenor, Columbia-Knickerbocker
Trust Company.

HARWOOD & SPRINGMEYER,

For the Receiver.

FARRINGTON, District Judge:

July 10, 1914, R. Woodland Gates filed his petition in intervention, alleging in substance, that between August 18, 1911, and March 1, 1913, he performed services as attorney and counselor at law for the Pacific Reclamation Company in prosecuting certain suits in the General Land Office and the Department of the Interior, in counseling and advising the defendant, and in attending in and about defendant's business, in re (a) Carson City Serial No. 04408, involving relinquishment of eight separate parcels of land; (b) eight cases involving script locations, covering eight separate tracts, in which cases adverse decisions were rendered by the Commissioner of the General Land Office, and appeals taken to the Secretary of the Interior; (c) hearings before and conferences with the Department of the Interior, the assistant attorney-general, [23] and others, in relation to Carey Act reclamation project; also in re-establishment of post office at Metropolis, Nevada.

It was alleged that the reasonable value of the service was \$25,000.

The intervenor claimed a lien under section 5376 of the Revised Laws of Nevada, against 480 acres of land owned by the Reclamation Company.

The relief demanded was a judgment against the Reclamation Company for \$25,000, and a decree that intervenor has a lien on said 480 acres of land.

On motion of the Columbia-Knickerbocker Trust Company and of the receiver, the bill in intervention was dismissed on the ground that petitioner had failed to set out facts sufficient to entitle him to a lien against the land described, or to bring him within the provisions of section 5376.

The order of dismissal was entered October 10, 1914, and allowed Gates twenty days thereafter within which to take such steps as he might be advised. This time was subsequently enlarged by the Court.

November 21, 1914, Gates filed a new bill, incorporating the provisions of his original bill, and adding thereto, in substance, as follows:

The General Land Office at Washington, D. C., is a quasi-judicial tribunal, a court of record, and its decisions are not subject to review by the courts. There is a detailed statement of services performed in the land office, showing that petitioner procured the acceptance of relinquishments of eight distinct tracts of land; that on appeal to the Secretary of the Interior, he secured a reversal of the ruling of the Commissioner holding that receiver Bacon, because he was a deputy United States mineral surveyor, was disqualified to enter the eight tracts of land for the Reclamation Company.

The bill also states that the land involved is one

of the main assets of the company; that it would have been lost to the company but for the efforts of the intervenor, and is reasonably worth half a million dollars; that the Pacific Reclamation Company December 23, 1909, conveyed all its property by trust deed to the Columbia-Knickerbocker Trust Company, under the then name of Columbia Trust Company. This conveyance was executed at a time when the Reclamation Company was in no wise the owner of the [24] 480 acres. The bill concludes with the same prayer which closes the bill of July 10, 1914, but no compensation is asked in connection with the establishment of a postoffice at Metropolis.

The Columbia-Knickerbocker Trust Company, January 6, 1915, moved "to dismiss and strike from the files paragraph XIV and XX, and that portion of the prayer in which the intervenor, R. Woodland Gates, claims a lien on 480 acres of land described in the petition in intervention, upon the ground that it appears upon the face of the bill that the same is insufficient in fact to constitute a valid cause in equity, or in any manner to entitle the said intervenor, R. Woodland Gates, to the relief prayed for, and further that the allegations in said paragraphs of said petition in intervention and in said prayer fail to set forth matters sufficient to entitle the intervenor, R. Woodland Gates, or and other person, to the relief prayed for, or any relief against the Columbia-Knickerbocker Trust Company."

The Trust Company also urges that the subject matter on which the lien is based, the lien claimed, and the so-called tribunal in which the services were

rendered, are identical in both bills, and were disposed of in the decision of October 10, 1914.

The last objection is well taken. The claim is to precisely the same lien which is urged in the original bill, and is foreclosed by the decision referred to.

Counsel for petitioner ask me to examine a number of recently discovered authorities bearing on their original contentions. The Nevada statute to which the intervenor appeals, reads as follows:

“From the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client’s cause of action or counterclaim which attaches to a verdict, report, decision, or judgment in his client’s favor and the proceeds thereof in whose-soever hands they may come, and cannot be affected by any settlement between the parties before or after judgment.”

It will be observed that the lien provided for here dates from the commencement of an action, or from the service of the answer, provided [25] such answer contains a counterclaim. The lien lies on the “cause of action or counterclaim,” and attaches to the “verdict, report, decision, or judgment in his client’s favor and the proceeds thereof.”

The reference is to civil actions only. The statute quoted is a part of the Civil Practice Act, which elsewhere (Secs. 4943–4) states there shall be in this State but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs. In such action the party complaining shall be known as the plaintiff,

and the adverse party as the defendant.

Our Supreme Court in *Haley vs. Eureka County Bank*, 21 Nevada, 127, defines an action thus: "An action is a legal prosecution by a party complainant, against a party defendant, to obtain the judgment of the court in relation to some rights claimed to be secured, or some remedy claimed to be given by law to the party complaining."

Unquestionably the word "action" as used in this connection applies to ordinary proceedings in courts of justice, prosecuted by one party as plaintiff against another party as defendant. Every other civil remedy is a special or quasi-judicial proceeding.

In order to enjoy the lien provided by the Nevada statutes, Gates must bring himself within its terms. This, in my opinion, he has not done. His services were rendered in proceedings before the United States Land Office, and in the Department of the Interior. There was neither plaintiff nor defendant; he guided the Pacific Reclamation Company in its efforts to procure title from the United States Government to lands which it desired to purchase. So far as the bill shows, there was no rival entryman seeking the same land.

The cases cited in behalf of Gates are beside this issue.

In *Renick vs. Ludington*, 16 W. Va., 378, it was held that the attorney was entitled to a *line* upon a judgment which he had obtained for his clients in a common law action brought on a contract.

In *Kappler v. Sumpter*, 33 App. Cas. (D. C.) 404, 408, there was a decree directing a writ of mandamus

to issue against the Secretary of the Interior, requiring him to restore complainant's name to the official [26] rolls of Chickasaw nation; the attorney claimed a lien on the lands which his client would receive in consequence of the decree as a member of that tribe of Indians.

In *Hartman v. Swiger*, 215 Fed., 986, the attorneys had in their hands more than four thousand dollars on which they claimed a lien for fees earned in numerous pieces of litigation. The principle on which this case was determined is set out in 4 Cyc., 1005.

In none of these cases was a lien either granted or claimed for services similar to those set out in the present petition in intervention.

The statute of New York, prior to 1899, contained the same provision as to attorneys' liens which appears in the Compiled Laws of Nevada.

In *Deering v. Schreyer*, 52 N. Y. Supp., 203, condemnation proceedings before commissioners resulted in a report awarding Schreyer \$2,250 for his lots on Lexington Avenue, New York City. An attorney's lien was claimed on this judgment. It was held that this was a special proceeding; that the lien given by the statute applied only to causes of action to enforce which an action had been commenced, or to recover which an answer containing a counter-claim had been served,

In *Goodrich v. McDonald*, 112 N. Y., 162, it is said that an attorney has two kinds of liens: He may retain all the papers of his client in his possession until his claim for services has been discharged; this

is known as a retaining lien; an attorney also has a lien for his compensation upon the funds or judgment which he had recovered; this is termed a charging lien. The Court thus states the method by which a charging lien may be enforced:

“If the fund recovered was in possession or under the control of the Court, it would not allow the client to obtain it until he had paid his attorney, and in administering the fund it would see that the attorney was protected. If the thing recovered was in a judgment, and notice of the attorney’s claim had been given, the Court would not allow the judgment to be paid to the prejudice of the attorney. If paid after such notice, in disregard of his right, the Court would, upon motion, set aside the discharge of the judgment, and allow the attorney [27] to enforce the judgment by its process so far as was needful for his protection. But after a very careful search we have been unable to find any case where an attorney has been permitted to enforce his lien upon a judgment for his services by an equitable action, or where he has been permitted to follow the proceeds of a judgment after payment of them to his client. His lien is made upon the judgment, and the Court will enforce that through the control it has of the judgment and its own records, and by means of its own process, which may be employed to enforce the judgment. But after the money recovered has been paid to his client, he has no lien upon that, and much less lien upon property purchased with that money, and transferred to another.”

In *Adee v. Adee*, 62 N. Y. Supp., 1101, the Court

held that an attorney had no lien on his client's interest in an estate, concerning which the attorney was employed in the Surrogates Court, because there was no cause of action or counterclaim within the meaning of the statute.

No authorities have been cited by the intervenor which *is* any wise modify the view expressed in the New York cases. I am therefore constrained to grant the motion of the Columbia-Knickerbocker Trust Company.

The whole of paragraphs XIV and XX of said complaint in intervention, and that portion of the prayer in which said intervenor claims a lien on the 480 acres of land described in paragraph IX, are stricken.

The intervenor will have twenty days within which to take such steps as he may be advised.

[Indorsed]: No. A-8. In the District Court of the United States, in and for the District of Nevada. Joseph Gutman, et al., Complainants, vs. Pacific Reclamation Company, a Corporation, Defendant. R. Woodland Gates, Intervenor. Opinion. Filed July 24th, 1915, T. J. Edwards, Clerk. [28]

[Exceptions of Intervenor to Order, etc.]

*In the District Court of the United States for the
District of Nevada.*

JOSEPH GUTMAN et al.,

Complainants,

vs.

PACIFIC RECLAMATION COMPANY, a Corpo-
ration,

Defendant.

R. WOODLAND GATES,

Intervenor,

vs.

PACIFIC RECLAMATION COMPANY, a Corpo-
ration, and GEORGE M. BACON, Receiver
Thereof,

Defendants.

Comes now the intervenor, R. Woodland Gates, by his solicitors, Sweeney, Morehouse and Griffin, and excepts to the order, judgment and decree of this Court in sustaining the motion to strike paragraphs XIV and XX of the bill in intervention of R. Woodland Gates, intervenor herein, or any part thereof, filed November 21, 1914.

And the intervenor further excepts to the order, judgment and decree of this Court in sustaining the motion to strike "also that portion of the prayer thereof in which the petitioner claims a lien on the 480 acres of land described in said paragraph XIV of said petition."

Because said order, judgment and decree is contrary to law.

SWEENEY, MOREHOUSE & GRIFFIN,
Solicitors for Intervenor R. Woodland Gates.

The foregoing Exceptions are allowed this 24th day of July, 1915.

E. S. FARRINGTON,
District Judge.

[Indorsed]: No. A-8. In the District Court of the United States, for the District of Nevada. Joseph Gutman, et al., Complainants, vs. Pacific Reclamation Company, a Corporation, Defendant. R. Woodland Gates, Intervenor, vs. Pacific Reclamation Company, a Corporation, and George M. Bacon, Receiver Thereof, Defendants. Exceptions. Sweeney, Morehouse and Griffin, Carson City, Nevada, Solicitors for Intervenor. Filed August 12, 1915. T. J. Edwards, Clerk. By H. D. Edwards, Deputy Clerk.

[29]

*In the District Court of the United States for the
District of Nevada.*

JOSEPH GUTMAN et al.,

Complainants,

vs.

PACIFIC RECLAMATION COMPANY, a Corporation,

Defendant.

R. WOODLAND GATES,

Intervenor,

vs.

PACIFIC RECLAMATION COMPANY, a Corporation, and GEORGE M. BACON, Receiver
Thereof,

Defendants.

Order Allowing Appeal, etc.

On motion of James G. Sweeney, Esq., one of the solicitors and counsel for R. Woodland Gates, intervenor herein, it is hereby,

ORDERED, that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the order, judgment and decree heretofore filed and entered herein, July 24, 1915, be, and the same is hereby allowed and that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings, be forthwith transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit. It is further ordered that the bond on appeal be fixed at the sum of Five Hundred (\$500) dollars.

Dated August 13th, 1915.

E. S. FARRINGTON,
United States District Judge.

[Indorsed]: No. A-8. In the District Court of the United States, for the District of Nevada. Joseph Gutman, et al., Complainants, vs. Pacific Reclamation Co., a Corporation, Defendant. R. Woodland Gates, Intervenor, vs. Pacific Reclamation Company, a Corporation, and George M. Bacon, Receiver

Thereof, Defendants. Order allowing Appeal. Filed August 14, 1915. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. .[30]

[Petition for Appeal]

*In the District Court of the United States for the
District of Nevada.*

JOSEPH GUTMAN et al.,

Complainants,

vs.

PACIFIC RECLAMATION COMPANY, a Corporation,

Defendant.

R. WOODLAND GATES,

Intervenor,

vs.

PACIFIC RECLAMATION COMPANY, a Corporation, and GEORGE M. BACON, Receiver Thereof,

Defendants.

To the Honorable E. S. FARRINGTON, District Judge.

The above-named R. Woodland Gates feeling aggrieved by the order, judgment and decree rendered and entered in the above-entitled cause on the 24th day of July, 1915, does hereby appeal from said order, judgment and decree to the Circuit Court of Appeals of the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and he prays that his appeal be allowed and that citation be

issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of said court in such cases made and provided.

Your petitioner further prays that the proper order relating to the required security to be required of him be made.

SWEENEY, MOREHOUSE & GRIFFIN,
Solicitors for R. Woodland Gates.

[Indorsed]: No. A-8. In the District Court of the United States, for the District of Nevada. Joseph Gutman, et al., Complainants, vs. Pacific Reclamation Company, a Corporation, Defendant. R. Woodland Gates, Intervenor, vs. Pacific Reclamation Co., a Corporation, and George M. Bacon, Receiver Thereof, Defendants. Filed August 14, 1915. T. J. Edwards, Clerk. By H. D. Edwards, Deputy.
[31]

*In the District Court of the United States, for the
District of Nevada.*

JOSEPH GUTMAN et al.,

Complainants,

vs.

PACIFIC RECLAMATION COMPANY, a Corporation,

Defendant.

R. WOODLAND GATES,

Intervenor,

vs.

PACIFIC RECLAMATION COMPANY, a Corporation, and GEORGE M. BACON, Receiver Thereof,

Defendants.

Assignment of Errors.

Now comes R. Woodland Gates, intervenor in the above-entitled cause, and filed the following assignment of errors, upon which he will rely upon his prosecution of the appeal in the above-entitled cause, from the order, judgment and decree made by this Honorable Court on the 24th day of July, 1915.

I. That the United States District Court for the District of Nevada erred in sustaining the motion to strike interposed by the Columbia-Knickerbocker Trust Company to the bill in intervention of R. Woodland Gates, or any part thereof, filed in this cause November 21, 1914.

II. That the United States District Court for the District of Nevada erred in sustaining the motion to strike paragraph XIV of said bill in intervention—which said paragraph was in words and figures following, to wit:

“XIV. And with respect to the said pretended rights of the said Columbia-Knickerbocker Trust Company, trustee, intervenor alleges that at the time said trust deed was made by the said Pacific Reclamation Company to said Columbia Trust Company, said Pacific

Reclamation Company was in now wise the owner of the land involved in the so-called 'Bacon cases' herein referred to and which comprise the said 480 acres of land obtained later through the labor and efforts of said intervenor for said Pacific Reclamation Company, and that the rights, interests and claims of the said [32] Columbia-Knickerbocker Trust Company, if any there be, are subject and subsequent to the lien and interest of this intervenor in the land involved in the said 'Bacon Cases,' so-called, aggregating 480 acres, herein and heretofore described."

III. That the United States District Court for the District of Nevada erred in sustaining the motion to strike paragraph XX of said bill in intervention, which said paragraph was in words and figures following, to wit:

"XX. Your intervenor further alleges that as the attorney and counsellor of said Pacific Reclamation Company in commencing actions and prosecuting suits before the General Land Office and before the Department of the Interior and the secretary thereof, he claims and is entitled under and pursuant to the terms and provisions of paragraph 5376 of the Revised Laws of Nevada (1912) being section 434 of 'An Act to regulate proceedings,' etc., to a lien upon the 480 acres of land, heretofore particularly described and which said land was the land involved in what is herein known as the 'Bacon cases'—in the sum of \$25,000.00 for and on ac-

count of services performed and rendered by him for and on behalf of the Pacific Reclamation Company before the General Land Office and the Department of the Interior of the United States—said services having been more fully and particularly hereinbefore described—upon an agreement by the said Pacific Reclamation Company to and with the said R. Woodland Gates, intervenor herein, to pay to said Gates a reasonable sum for his services rendered in said General Land Office and said Department of the Interior.”

IV. That the District Court of the United States for the District of Nevada erred in sustaining the motion to strike “also that portion of the prayer thereof in which the petitioner claims a lien on the 480 acres of land, described in said paragraph XIV,” which said portion of said prayer of said petition was in words and figures following, to wit:

“And that he (intervenor meaning) may be decreed to have a lien on the 480 acres of land heretofore more particularly described and which were saved to said Pacific Reclamation Company by the labor and industry of [33] said intervenor.”

Because said order, judgment and decree sustaining said motions to strike is contrary to law and justice.

Wherefore, the appellant, R. Woodland Gates, prays that the said decree be reversed, and the said District Court of the United States for the District of Nevada be ordered to enter a decree reversing

the decision of the lower court in said cause.

SWEENEY, MOREHOUSE & GRIFFIN,

Solicitors for Appellant, R. Woodland Gates.

[Indorsed]: No. A-8. In the District Court of the United States, for the District of Nevada. Joseph Gutman, et al., Complainants, vs. Pacific Reclamation Company, a Corporation, Defendant. R. Woodland Gates, Intervenor, vs. Pacific Reclamation Company, a Corporation, and George M. Bacon, Receiver Thereof, Defendants. Assignment of Error. Filed August 14, 1915. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. Sweeney, Morehouse and Griffin, Carson City, Nev., Solicitors for Intervenor. [34]

*In the District Court of the United States, for the
District of Nevada.*

JOSEPH GUTMAN et al.,

Complainants,

vs.

PACIFIC RECLAMATION COMPANY, a Corporation,

Defendant,

R. WOODLAND GATES,

Intervenor,

vs.

PACIFIC RECLAMATION COMPANY, a Corporation, and GEORGE M. BACON, Receiver Thereof,

Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, that we, R. Woodland Gates, as principal, and Chas. J. Rulison and George Gillson, as sureties, of the county of Ormsby, State of Nevada, are held and firmly bound unto the Columbia-Knickerbocker Trust Company, a corporation, in the sum of five hundred (\$500) dollars, lawful money of the United States, to be paid to them, and their respective executors, administrators and successors; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and each of our heirs, executors and administrators by these presents.

Sealed with our seals and dated this 13th day of August, 1915.

Whereas, the above-named R. Woodland Gates, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment of the District Court of the United States for the District of Nevada, in the above-entitled cause.

Now, Therefore, the condition of this obligation is such, that if the above-named R. Woodland Gates shall prosecute his said appeal to effect and answer all costs, if he fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and effect.

R. WOODLAND GATES,
By JAMES G. SWEENEY,
His Attorney.

CHAS. J. RULISON.
GEORGE GILLSON. [35]

State of Nevada,
County of Ormsby,—ss.

On the 16th day of August, 1915, personally appeared before me, Chas. J. Rulison and George Gillson, respectively known to me to be the persons described in and duly executed the foregoing instrument as parties thereto, and respectively acknowledged, each for himself, that they executed the same as their free act and deed for the purposes therein set forth.

And the said Chas. J. Rulison and George Gillson, being respectively by me duly sworn says, each for himself and not one for the other, that he is a resident and householder of the said county of Ormsby, and that he is worth the sum of five hundred (\$500) dollars, over and above his just debts and legal liability and property exempt from execution.

CHAS. J. RULISON.
GEORGE GILLSON.

Subscribed and sworn to before me this 16th day of August, 1915.

[Seal]

JONATHAN PAYNE,
Notary Public.

The within bond is approved both as to sufficiency and form this 16th day of August, 1915.

E. S. FARRINGTON,
District Judge.

[Indorsed]: No. A-8. In the District Court of the United States, for the District of Nevada. Joseph Gutman, et al., Complainants, vs. Pacific

Reclamation Company, a Corporation, Defendant.
R. Woodland Gates, Intervenor, vs. Pacific Reclamation Company, a Corporation, and George M. Bacon, Receiver Thereof, Defendants. Bond on Appeal. Filed August 16, 1915. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. Sweeney, Morehouse and Griffin, Carson City, Nevada, Solicitors for Intervenor. [36]

*In the District Court of the United States in and
for the District of Nevada.*

JOSEPH GUTMAN et al.,

Complainants,

vs.

PACIFIC RECLAMATION COMPANY et al.,
Defendants.

COLUMBIA-KNICKERBOCKER TRUST COMPANY, Trustee,

Intervenor,

and

R. WOODLAND GATES,

Intervenor.

Praecipe [of Solicitors for Columbia-Knickerbocker Trust Co., Intervenor, for Additional Portions of the Record].

To the Clerk of the Above-entitled Court:

You will please prepare and incorporate into the transcript in the above-entitled cause on appeal, the following additional portions of the record:

1. First bill in intervention of R. Woodland

Gates (filed on or about July 7th, 1914).

2. Motion of Columbia-Knickerbocker Trust Company to dismiss and strike *first* bill in intervention of R. Woodland Gates (being order sustaining motion to dismiss and strike complaint in intervention which was filed July, 1914).

Dated this 21st day of August, 1915.

CHARLES C. DEY,
A. L. HOPPAUGH,
H. P. FABIAN,

Solicitors for Columbia-Knickerbocker Trust Co.,
Intervenor.

[Indorsed]: No. A-8. In the District Court of the United States, for the District of Nevada. Joseph Gutman, et al., Complainants, vs. Pacific Reclamation Company, et al., Defendants. Columbia-Knickerbocker Trust Company, Trustee, Intervenor, and R. Woodland Gates, Intervenor. Praecipe for Additional Portions of the Record. Filed August 23d, 1915. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. [37]

*In the District Court of the United States for the
District of Nevada.*

JOSEPH GUTMAN et al.,

Complainants,

vs.

PACIFIC RECLAMATION COMPANY, a Cor-
poration,

Defendant.

R. WOODLAND GATES,

Intervenor.

vs.

PACIFIC RECLAMATION CO., a Corporation,
and GEORGE M. BACON, Receiver Thereof,
Defendants.

**Praeipe [of Solicitors for Intervenor, R. Woodland
Gates for Transcript of Record].**

To the Clerk of the Above-entitled Court:

Please prepare transcript in the above-entitled case, for the United States Circuit Court of Appeals, as follows:

1. Bill in Intervention of R. Woodland Gates filed November 21, 1914.
2. Demurrer or Motion to Strike of the Columbia-Knickerbocker Trust Company.
3. Order Sustaining Demurrer or Motion to Strike.
4. Opinion of Court, if any.
5. Petition for Appeal.
6. Assignments of Error.
7. Order Allowing Appeal.
8. Bond on Appeal.
9. Praeipe (for Transcript of Record).
10. Citation on Appeal.

SWEENEY, MOREHOUSE & GRIFFIN,
Solicitors for Intervenor, R. Woodland Gates. [38]

Service of the foregoing by copy acknowledged this 19th day of August, 1915.

DEY, HOPPAUGH & FABIAN,
Solicitors for Columbia-Knickerbocker Trust Co.

[Endorsed]: No. A-8. In the District Court of the United States, for the District of Nevada. Joseph Gutman, et al., Complainants, vs. Pacific Reclamation Co., a Corporation, Defendant. R. Woodland Gates, Intervenor, vs. Pacific Reclamation Co., a Corporation, and George M. Bacon, Receiver Thereof, Defendants. Praeipie (for Transcript of Record). Filed August 23, 1915. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. Sweeney, Morehouse and Griffin, Carson City, Nevada, Solicitors for Intervenor. [39]

*In the District Court of the United States, in and
for the District of Nevada.*

JOSEPH GUTMAN et al.,

Complainants,

vs.

PACIFIC RECLAMATION COMPANY et al.,

Defendants.

COLUMBIA-KNICKERBOCKER TRUST COM-
PANY, Trustee,

Intervenor.

and

R. WOODLAND GATES,

Intervenor.

**Praeipie [of Solicitors for Intervenor, R. Woodland
Gates] for Additional Portions of the Record.**

To the Clerk of the Above-entitled Court:

You will please prepare and incorporate into the transcript in the above-entitled cause on appeal, the following additional portions of the record: 1. “Ex-

ceptions" filed on behalf of intervenor, R. Woodland Gates, August 12th, 1915; 2. "Proceedings" had in Open Court, June 28, 1915.

W. W. GRIFFIN, SWEENEY & MOREHOUSE,

Solicitors for Intervenor, R. Woodland Gates.

[Indorsed]: No. A.-8. In the District Court of the United States, in and for the District of Nevada. Joseph Gutman et al., Complainants, vs. Pacific Reclamation Company et al., Defendants. Columbia-Knickerbocker Trust Company, Trustee, Intervenor, and R. Woodland Gates, Intervenor. Praecipe for Additional Portions of the Record. Sweeney, Morehouse & Griffin, Carson City, Nevada, Solicitors for Intervenor R. Woodland Gates. Filed September 20, 1915. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. [40]

**[Proceedings Had June 28, 1915, on Motion to Strike
Petition in Intervention.]**

The above-entitled matter came on for hearing on June 28, 1915, before the Honorable E. S. Farrington, U. S. District Judge, on motion to strike the petition in intervention of R. Woodland Gates from the files, at which time the following proceedings occurred:

Mr. HOPPAUGH.—Some time last July, as your Honor will remember, a complaint in intervention was filed in this cause by R. Woodland Gates. The complaint in intervention set up, substantially, that Mr. Gates had rendered services in the Department of the Interior, and on appeal, and in securing a

postoffice for the town of Metropolis; and by virtue of these services Mr. Gates asked that there be allowed the sum of \$25,000 as a preferred claim, paramount to the other claims, against 480 acres of land. The matter came up on motion to strike, as your Honor will remember. Our position was that the statute of the State of Nevada dealing with attorneys and referring to actions, and the proceeds of actions, did not aid the parties. The question was raised squarely on the merits; it was not a matter of form; it was a matter of substance; briefs were presented, and your Honor, after a full discussion of the question, sustained our motion, and struck the complaint in intervention. If the ruling of the Court were wrong, the intervenor, of course, would have his appeal, but so long as that ruling remains, it is the law of the case.

If there were any way of aiding the allegations of the complaint in intervention, perhaps an amendment would lie; but an amended complaint in intervention would set out substantially those same allegations, and to cloud the record with a new complaint in intervention covering exactly the same items, would be almost akin to contempt of court. Counsel sought to avoid that by filing another complaint in intervention—not an amendment, but a complaint in intervention—setting out the same cause of action, covering the same allegations, in fact, that your Honor had passed on upon the motion to strike. We now by motion to strike, ask that that document be stricken from the files, and that the allegations themselves, which go to the very root of the charges, be

stricken from the complaint in intervention.

Mr. GRIFFIN.—May it please your Honor, it is true, as counsel says, that the motion to strike was sustained. As I conceive it, the motion to [41] strike, under the present equity rules, is very much in the nature of a demurrer, the demurrer having been done away with. The complaint in intervention, if your Honor please, was stricken on various grounds, mainly because your Honor held that it did not state grounds sufficient to constitute a cause of action, and at the end of your Honor's order, you used these words: "The intervenor will be allowed twenty days within which to take such steps as he may be advised." It is possible that the word "amended" should have been added prior to the words "Bill in Intervention," but that does not change the status, as I conceive it. Your Honor gave us a right to take such proceedings as we might be advised; and we believed we had a right to file an amended bill in intervention covering the grounds which counsel set up in his motion to strike. We believe we have a right to be in court on this new bill in intervention, if we may call it such, or we will ask leave to call it an amended bill—we believe we have a right to be heard.

Mr. HOPPAUGH.—If your Honor please, as I said before, had counsel presented this as an amended bill—and I will submit it to your Honor for comparison on the question which your Honor decided—that amended bill would be on the verge of contempt. He does not pretend to file this as an amended bill; and as to the merits, in view of the authorities which

are here on file, I will only ask your Honor to compare the bills. The question which we discussed before, and which your Honor decided, is just as squarely presented in this so-called new bill as it was in the old, and there is no other question except the one your Honor has passed on, and as to that I will simply submit the new and the old bills. The briefs are on file.

Mr. GRIFFIN.—On that point I cannot agree with counsel. We were perfectly honest in our procedure. We contend, and contend honestly, that the bills in intervention do materially differ, and we, too, are glad to leave it to your Honor.

The COURT.—I will look over the two petitions, but if the second involves the same question I decided before, I do not care to consider it. If you so intended it, I am willing to treat your second petition as an amended bill. [42]

[Certificate of Shorthand Reporter to Copy of Proceedings Had June 28, 1915.]

I hereby certify the foregoing to be a true and correct copy of my shorthand notes of the remarks of counsel and the Court regarding the nature of the petition in intervention of R. Woodland Gates, taken June 28th, 1915, in the case of Joseph Gutman et al., Plaintiffs, vs. Pacific Reclamation Company, a corporation, Defendant.

A. F. TORREYSON,
Shorthand Reporter.

[Endorsed]: No. A-8. In U. S. District Court, District of Nevada. Gutman et al. vs. Pacific

Reclamation Co. Intervention of R. Woodland Gates. Proceedings had June 28, 1915. Filed Sept. 20, 1915. T. J. Edwards, U. S. Clerk. By H. D. Edwards, Deputy. [43]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court of the United States for the District of Nevada.

JOSEPH GUTMAN et al.,

Complainants,

vs.

PACIFIC RECLAMATION COMPANY, a Corporation,

Defendant,

and

R. WOODLAND GATES,

Intervenor.

I, T. J. Edwards, clerk of the District Court of the United States for the District of Nevada, do hereby certify that the foregoing forty-three (43) type-written, numbered from 1 to 43, both inclusive, are a true and full copy of the record and all proceedings in said cause and court, and that the same, together with the original citation, hereto annexed, constitute the return to the appeal.

I do hereby certify that the cost of the foregoing record is \$41.00, and that the same has been paid by the intervenor herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court, at my office in

Carson City, Nevada, this 29th day of November,
1915.

[Seal]

T. J. EDWARDS,

Clerk.

[Ten Cent Internal Revenue Stamp. Canceled
11/29/15. T. J. E.] [44]

*In the District Court of the United States for the
District of Nevada.*

JOSEPH GUTMAN et al.,

Complainants,

vs.

PACIFIC RECLAMATION COMPANY, a Cor-
poration,

Defendant.

R. WOODLAND GATES,

Intervenor,

vs.

PACIFIC RECLAMATION COMPANY, a Cor-
poration, and GEORGE M. BACON, Receiver
Thereof,

Defendants.

R. WOODLAND GATES,

Intervenor, Appellant,
and

COLUMBIA-KNICKERBOCKER TRUST COM-
PANY, Trustee,

Intervenor, Appellee.

Citation on Appeal (Original).

United States of America,
District of Nevada,—ss.

To Columbia-Knickerbocker Trust Company,
Trustee, Intervenor, Appellee herein, GREET-
ING: [45]

You are hereby cited and admonished to be and *appeal* in the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, thirty days from and after the day this citation bears date, pursuant to an appeal filed in the clerk's office of the District Court of the United States for the District of Nevada, wherein Joseph Gutman et al. are complainants, and the Pacific Reclamation Company, a corporation, is defendant; and wherein R. Woodland Gates is intervenor and Pacific Reclamation Company, a corporation, and George M. Bacon, receiver thereof, are defendants; and wherein R. Woodland Gates is intervenor, appellant, and Columbia-Knickerbocker Trust Company, trustee, is intervenor, appellee, to show cause, if any there be, why the order, judgment and decree rendered against the said R. Woodland Gates, intervenor, appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

WITNESS, the Honorable E. S. FARRINGTON,
Judge of the District Court of the United States, for
the District of Nevada, this 30th day of September,
A. D. 1915.

E. S. FARRINGTON,
United States District Judge. [46]

[Endorsed]: No. A-8. In the District Court of the United States, for the District of Nevada. Joseph Gutman et al., Complainants, vs. Pacific Reclamation Company, a Corporation, Defendant. R. Woodland Gates, Intervenor, vs. Pacific Reclamation Company, a Corporation, and George M. Bacon, Receiver Thereof, Defendants. R. Woodland Gates, Intervenor-appellant, and Columbia-Knickerbocker Trust Company, Trustee, Intervenor-appellee. Citation (on Appeal—Original). Filed October 19th, 1915. T. J. Edwards, Clerk, U. S. District Court, District of Nevada. By H. D. Edwards, Deputy.

Service of the within citation and the receipt of a copy thereof, is hereby admitted this 2d day of October, A. D. 1915.

GIFFORD, HOBBS & BEARD and
DEY, HOPPAUGH & FABIAN,
Solicitors for Columbia-Knickerbocker Trust Com-
pany, Intervenor-Appellee. [47]

[Endorsed]: No. 2690. United States Circuit Court of Appeals for the Ninth Circuit. R. Woodland Gates, Appellant, vs. Columbia-Knickerbocker Trust Company, a Corporation, Trustee, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Nevada.

Filed November 30, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

*In the District Court of the United States for the
District of Nevada.*

JOSEPH GUTMAN et al.,

Complainants,

vs.

PACIFIC RECLAMATION COMPANY, a Cor-
poration,

Defendant.

R. WOODLAND GATES,

Intervenor,

vs.

PACIFIC RECLAMATION COMPANY, a Cor-
poration, and GEORGE M. BACON, Receiver
Thereof,

Defendants.

R. WOODLAND GATES,

Intervenor, Appellant,

and

COLUMBIA-KNICKERBOCKER TRUST COM-
PANY, Trustee,

Intervenor, Appellee.

**Order Enlarging Time [to November 15, 1915, for
Filing Record].**

Good cause appearing:

IT IS HEREBY ORDERED that the time for
filing the record in the above-entitled cause may be
and hereby is enlarged to and to include the 15th day
of November, 1915.

WM. W. MORROW,

Judge United States Circuit Court of Appeals, Ninth
Circuit.

Dated November 1st, 1915. San Francisco, California.

[Endorsed]: No. A-8. In the District Court of the United States for the District of Nevada. Joseph Gutman et al., Complainants, vs. Pacific Reclamation Company, a Corporation, Defendant. R. Woodland Gates, Intervenor, vs. Pacific Reclamation Company, a Corporation, and George M. Bacon, Receiver Thereof, Defendants. R. Woodland Gates, Intervenor, Appellant, and Columbia-Knickerbocker Trust Company, Trustee, Intervenor, Appellee. Order Enlarging Time.

No. 2690. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Nov. 15, 1915, to File Record Thereof and to Docket Case. Filed Nov. 1, 1915. F. D. Monckton, Clerk.

*In the District Court of the United States for the
District of Nevada.*

JOSEPH GUTMAN et al.,

Complainants,

vs.

PACIFIC RECLAMATION COMPANY, a Corporation,

Defendant.

R. WOODLAND GATES,

Intervenor,

vs.

PACIFIC RECLAMATION COMPANY, a Corporation, and GEORGE M. BACON, Receiver Thereof,

Defendants.

R. WOODLAND GATES,

Intervenor, Appellant,
and

COLUMBIA-KNICKERBOCKER TRUST COMPANY, Trustee,

Intervenor, Appellee.

Order Enlarging Time [to November 27, 1915, for Filing Record].

GOOD CAUSE APPEARING:

It is hereby ordered that the time for filing the record on appeal in the above-entitled cause, in the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby extended to and to include the twenty-seventh day of November, 1915.

E. S. FARRINGTON,

U. S. District Judge for the District of Nevada,
Carson City, Nevada, November 11th, 1915.

[Endorsed]: In the District Court of the United States, for the District of Nevada. Joseph Gutman et al., Complainants, vs. Pacific Reclamation Company, a Corporation, Defendant. R. Woodland Gates, Intervenor, vs. Pacific Reclamation Company, a Corporation, and George M. Bacon, Receiver There-

of, Defendants. R. Woodland Gates, Intervenor, Appellant, and Columbia-Knickerbocker Trust Co., Trustee, Intervenor, Appellee.

No. 2690. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Nov. 27, 1915, to File Record Thereof and to Docket Case. Filed Nov. 12, 1915. F. D. Monckton, Clerk.

*In the District Court of the United States for the
District of Nevada.*

JOSEPH GUTMAN et al.,

Complainants,

vs.

PACIFIC RECLAMATION COMPANY.

Defendant.

R. WOODLAND GATES,

Intervenor,

vs.

PACIFIC RECLAMATION COMPANY, a Corporation, and GEORGE M. BACON, Receiver Thereof,

Defendants.

COLUMBIA-KNICKERBOCKER TRUST COMPANY, a Corporation,

Intervenor,

vs.

PACIFIC RECLAMATION COMPANY, a Corporation,

Defendant.

**Order Enlarging Time [to December 1, 1915] for
Filing Record.**

GOOD CAUSE APPEARING:

IT IS ORDERED that the time for filing the record in the above-entitled cause, be and the same is hereby extended to and to include the first day of December, 1915.

E. S. FARRINGTON,

U. S. District Judge for the District of Nevada.

Dated Carson, November 26th, 1915.

[Endorsed]: In the District Court of the United States for the District of Nevada. Joseph Gutman et al., Plaintiffs, vs. Pacific Reclamation Company, Defendant. R. Woodland Gates, Intervenor, vs. Pacific Reclamation Company and George M. Bacon, Receiver Thereof, Defendants. Columbia-Knickerbocker Trust Co., Intervenor, vs. Pacific Reclamation Company and George M. Bacon, Receiver Thereof, Defendants. Order Enlarging Time.

No. 2690. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Dec. 1, 1915, to File Record Thereof and to Docket Case. Filed Nov. 27, 1915. F. D. Monckton, Clerk.

No. 2690. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Dec. 1, 1915, to File Record Thereof and to Docket Case. Refiled Nov. 30, 1915. F. D. Monckton, Clerk.

No. 2690.

IN THE
United States Circuit Court of Appeals

For the Ninth Circuit.

R. WOODLAND GATES,

Appellant,

v's.

COLUMBIA-KNICKERBOCKER TRUST
COMPANY, a corporation, Trustee,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF NEVADA.

BRIEF FOR APPELLANT.

About March 21, 1913 Joseph Gutman and many others filed their separate suits against the Pacific Reclamation Company and the Metropolis Improvement Company, both corporations, asking for the appointment of a Receiver, the sale of the property and the distribution of the proceeds of the sale among those entitled thereto.

Thereafter R. Woodland Gates, appellant here, by permission of the Court, filed his Bill in Intervention. The Columbia-Knickerbocker Trust Company, a corporation, Trustee, appellee here, also an intervenor below, moved "to dismiss and strike" the Bill of Intervention and this motion prevailed. Sometime thereafter the Intervenor Gates filed another or *amended* Bill in Intervention (See Transcript of Record—"The Court" p. 58). This latter Bill in Intervention, the Appellee, Columbia-Knickerbocker Trust Company also moved to "dismiss and strike" and more particularly paragraphs XIV and XX thereof and "that portion of the prayer in which the Intervenor Gates claims a lien on 480 acres of land described in said petition in Intervention."

This latter "motion to dismiss and strike" was granted and it is from the order granting this motion that this case is now on appeal in this Court.

STATEMENT OF THE CASE.

For the purpose of the demurrer or the "motion to dismiss and strike" which is now before this Court the allegations of the last Bill in Intervention, must, we perceive, be taken as true.

The substantial allegations of the Bill are:

That between the 18th of August, 1911, and the 1st of March, 1913, the intervenor, Gates, appellant here, performed services in prosecuting certain suits in the General Land

Office, Department of the Interior, in canceling and advising the defendant (The Pacific Reclamation Co.) and attending in and about the business of the defendant, as follows:

(a) Involving relinquishments of eight parcels of land involving script location covering eight separate tracts.

(b) Involving hearing before and conference with the Department of the Interior, the Assistant Attorney-General and the Interior Department.

The bill further alleges that the reasonable value of the service is the sum of \$25,000 and the Intervenor, Gates, claims, by virtue of these services, a lien under paragraph 5376 of the Revised Laws of Nevada, being Section 434 of the Practice Act which reads as follows:

"The compensation of an attorney and counsellor for his services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action or the service of an answer containing a counter-claim, the attorney who appears for a party has a lien upon his client's cause of action or counter-claim which attaches *to a verdict, report, decision or judgment in his client's favor*, and the proceeds thereof, in whosoever hands they may come, cannot be affected by any settlement between the parties before or after judgment. There shall be allowed to the prevailing party in any action or special proceeding in the nature of an action in the Supreme Court and District Courts, his costs and necessary disbursements in the action or special proceeding."

Specifically the Columbia-Knickerbocker Trust Company moved to strike Paragraph XIV of the Bill in Intervention which reads as follows:

"XIV. And with respect to the said pretended rights of the said Knickerbocker Trust Company, trustee, intervenor

alleges that at the time said trust deed was made by the said Pacific Reclamation Company to said Columbia-Knickerbocker Trust Company, said Pacific Reclamation Company was in no wise the owner of the land involved in the so-called "Bacon cases" herein (16) referred to, and which comprise the said 480 acres of land obtained later through the labor and efforts of said intervenor for said Pacific Reclamation Company and that the rights, interests and claims of the said Columbia-Knickerbocker Trust Company, if any there be, are subject and subsequent to the lien and interest of this intervenor in the land involved in the said "Bacon cases," so-called, aggregating 480 acres, herein and heretofore described."

And Paragraph XX in words following:

"XX. Your intervenor further alleges that, as the attorney and counsellor of said Pacific Reclamation Company in commencing actions and prosecuting suits before the General Land Office and before the Department of Interior, and the secretary thereof, he claims and is entitled, under and pursuant to the terms and provisions of Paragraph 5376 of the Revised Laws of Nevada (1912) being section 434 of "An Act to regulate proceedings" etc.—to a lien upon the 480 acres of land, heretofore particularly described and which said land was the land involved in what is herein known as the "Bacon cases"—in the sum of \$25,000 for and on account of services performed and rendered by him for and on behalf of the Pacific Reclamation Company before the General Land Office and the Department of the Interior of the United States—said services having been more fully and particularly hereinbefore described—upon an agreement by the said Pacific Reclamation Company to and with the said R. Wooland Gates, Intervenor herein, to pay to said Gates a reasonable sum for his services rendered in said General Land Office and said Department of the Interior."

And they further moved to strike that portion of the prayer of the Bill of Intervention in which the Intervenor Gates, appellant here, claims a lien on 480 acres of land described in the bill in intervention.

SPECIFICATIONS OF ERROR.

The appellant relies upon and urges, as grounds for reversal of the judgment of the District Court, the following as error:

I.

That the District Court erred in sustaining the motion to strike paragraph XIV and XX of the second Bill of Intervention of R. Woodland Gates or any part thereof.

II.

That the District Court erred in sustaining the motion to strike "also that portion of the prayer hereof in which the petitioner claims a lien on the 480 acres of land described in Paragraph XIV of said petition," for the following reasons, to-wit:

1. That the allegations of the Bill in Intervention show that the 480 acres of land in question were obtained through the efforts and labor of R. Woodland Gates, as an attorney and counsellor at law.

2. That by virtue of his services as such attorney and counsellor at law in this behalf, appellant Gates has a lien on the 480 acres of land in question under Section 5376 of the Revised Laws of Nevada (1912.)

ARGUMENT.

Simply speaking, the appellant contends by the allegations of his Bill—admittedly true for the purposes of this argument—that he performed certain services before the General Land Office and the Department of the Interior—each, as he con-

tends, a quasi judicial tribunal and a Court of Record;—that much of the land in question—some four hundred and eighty acres—made valuable by improvement—was obtained for the Pacific Reclamation Company through his professional efforts and labor, and that he is entitled to a lien for his professional services so rendered.

Aside from paragraphs XIV and XX of the new or *amended* Bill in Intervention, which was filed November 21, 1914 and accepted by the Court as an amended Bill (see Transcript Record, p. 58) which it was sought to strike “upon the ground that it appears on the face of the Bill that the same is insufficient in fact to constitute a valid cause of action in equity or in any manner to entitle said intervenor, R. Woodland Gates, to the relief prayed for and further that the allegations in said paragraphs of said Bill of Intervention and in said prayer fail to set forth matters sufficient to entitle intervenor, R. Woodland Gates to the relief prayed for or any relief at all against the Columbia-Knickerbocker Trust Company, Trustee” and which were stricken by order of the Court, the new or amended Bill in Intervention (see Transcript of Record, p. 15) contains in its several paragraphs some very pertinent allegations—important and salient to a degree in this argument.

Turning now to Paragraph XIV and XX (Transcript of Record, pp. 23 and 25) let us ask:

Wherein are they objectionable?

Now as to Paragraph XIV—it recites that at the time the trust deed was made to the Columbia-Knickerbocker Trust

Company, Trustee, the Pacific Reclamation Company was not the owner of the 480 acres of land afterwards obtained for the Reclamation Company through the labor and professional efforts of the appellant Gates—and that for that reason the claims of the Columbia-Knickerbocker Trust Company, if any there be, are inferior to and subject to that of R. Woodland Gates. The forepart of the paragraph is certainly nothing more than a true statement of the facts; and while the latter part of it might be subjected to the objection that it is a conclusion of law—it is intended merely as a recital that, in point of time, the appellant Gates has a prior right to protection.

As to Paragraph XX—to that paragraph the real objection of the appellee is directed—and for obvious reasons. (See Transcript of Record, Par. XX, p. 25.)

It would seem that appellee here, movants below, have gone far afield in their attempt to becloud the issues and the real rights of the Intervenor, appellant Gates, for their demurrer on “motion to dismiss and strike” practically excepts to Gates’ work and services being recognized and paid for out of the fund which he, Gates, made, albeit appellee seeks to reap the benefits of Gates’ work and labor and the proceeds of the fund his efforts have produced.

Has Gates the appellant a lien or can he claim one?

There is no case on record, so far as we have been able to discover on all fours with the case at bar; but there is one akin to it, which, we believe, by analogy at least, can be brought squarely within its purview.

In *Kappler vs. Sumpter*, 33 Appeal Cases (D. C.), at page 408, Mr. Chief Justice Shepard very aptly observes:

"It is argued by appellants that by the terms of the act of Congress, they are entitled to a lien upon the land which the parties may receive through their restoration to the rolls as members of the Indian tribes, and which they may lose the benefit of under this order. Granting the existence of such a lien, it could not be enforced in the pending action by any order therein; nor could it be taken away.

"It seems that all such contracts with Indians are subject to the supervision and allowance of the Secretary of the Interior. All of the attorneys will probably have to go before him for a final approval and settlement of their contracts and claims for fees. And there is nothing in the orders complained of that would preclude inquiry by him into the several contracts of the attorneys, and the allowance of the same as may appear fair and just, to the full extent of the discretion committed to him by Congress in such matters. But, if the secretary have no such discretionary power under the law, the parties will not be deprived of their remedies *in the courts having jurisdiction in the premises*."

Judicial cognizance will be taken of the fact that the Bureau of Indian Affairs and the General Land Office, are sub-departments, so to speak, of the Department of Interior; and that each, in its own proper sphere, bears the same relation to the Department of the Interior, as the other.

If this decision of Chief Justice Shepard is the law—we have a lien but could not enforce it in the Department of the Interior "as the Secretary has no such discretionary power under the law"—but we shall not be "deprived of our remedy or remedies in the *Courts having jurisdiction in the premises*."

Had not the District Court, then, jurisdiction of the matter and is not that the forum for its adjudication?

In view of the decision in *Kappler vs. Sumpter*, *supra*, the right of action accrues then and if Judge Shepard's views reflect the law—and we know of nothing to the contrary—we certainly have the right to follow the fund—which, but for the labors of Gates, would not now be in Court in any form. It would certainly be inequitable after the labor had been performed by Gates and the result had been achieved and the fund produced—that the Columbia-Knickerbocker Trust Company should be allowed to absorb the fund, or any portion of it, which justly and honestly belongs to Gates. How can the Columbia-Knickerbocker Trust Company be heard, in a Court of equity, to except to Gates' work and services being paid for out of the fund realized by his labor and efforts when they, themselves, are seeking by every means known to law or equity, to reap the benefit of that very work and labor and the proceeds of the fund which Gates created.

It will not be gainsaid by any solicitor or counsel connected in any way with the main litigation in this case that the primary purpose of the Receivership in this case, as shown by the allegations as set forth in the original Bill in Equity filed by Gutman et al—was not because of the insolvency of the Pacific Reclamation Company, inasmuch as it has resources of over a million and a quarter of dollars,—but rather to protect certain water rights and to re-adjust stock issues by a reorganization of the body corporate. The bondholders—the appellee—know this.

Apropos of this law of reorganization, the late Mr. Justice

Lamar, speaking for the Supreme Court of the United States in the case of Northern Pacific Railway Company against Boyd, 228 U. S. 501 very tersely observes:

“Corporations, insolvent or financially embarrassed, often find it necessary to scale their debts and readjust stock issues with an agreement to conduct the same business with the same property under a reorganization. This may be done in pursuance of a private contract between bondholders and stockholders. And though the corporate property is thereby transferred to a new company, having the same shareholders, the transaction would be binding between the parties. But, of course, such a transfer by stockholders from themselves to themselves cannot defeat the claim of a nonassenting creditor. As against him the sale is void in equity, regardless of the motive with which it was made. For if such contract reorganization was consummated in good faith and in ignorance of the existence of the creditor, yet when he appeared and established his debt, the subordinate interest of the old stockholders would still be subject to his claim in the hands of the reorganized company.”

In that case it will be seen, therefore, that the lien, entrenched in the 1896 judgment obtained by Spaulding, flowed to Boyd, and that Boyd's lien followed the fund from the Coeur D'Alene Railroad and Navigation Company, to the Northern Pacific Railroad Company and many years afterwards, even though in misshapen form, to the property of the Northern Pacific Railway Company wherein it found permanent lodgment by the decision of Mr. Justice Lamar.

We contend, therefore, that if the legal plan of reorganization would not and could not cut out Gates—certainly Equity will not lend its hand to deprive him of the fruits admittedly of his labor.

An instructive case upon this subject is that of *Davis v. Gemell*, (73 Md. 530) wherein the opinion was delivered by Judge McSherry.

There, one William A. Brydon, a majority stockholder of the North Branch Company, recovered judgment against the Baltimore & Ohio R. R. Co., and the judgment, amounting with interest to more than \$100,000, was, afterwards, entered to the use of Henry G. Davis & Co. Brydon had employed Messrs. Walsh, Poe and Carter, as attorneys, to bring and conduct the litigation, upon a contingent fee, based upon a certain percentage of the amount recovered, and they secured the judgment.

Before the judgment was paid, Gemell and others, minority stockholders of said North Branch Company, through other attorneys, (Cross and Marbury) filed suit in equity claiming that the judgment belonged to said North Branch Company and not to Brydon individually, although Brydon had recovered the judgment in his individual name. After litigation, that claim was sustained, and the Court appointed a receiver and ordered the amount of the judgment distributed to the stockholders of the North Branch Company, refusing to decree its payment to the company itself because of the fraudulent acts of the majority stockholder. Two claims for attorney's services were there presented in connection with the distribution: Walsh, Poe and Carter claimed their agreed contract compensation out of the fund; Cross and Marbury claimed compensation for preserving the fund to all of the stockholders,

under employment by minority stockholders, as above; and both claims were allowed by the Court, the former upon the percentage fixed by the contract, and the latter upon a *quantum meruit*.

Gemell and others objected to the payment, out of said fund, of fee to Walsh, Poe and Carter; but the Court of Appeals of Maryland overruled the objection, thus stating:

*"But for the labors of these counsel no fund would now be in court as the result of that litigation. They acted in the utmost good faith through the whole controversy. It is inequitable after the labor has been performed and the result has been achieved that Gemell and Sinclair should be allowed to absorb that portion of the fund which, under Brydon's contract with his counsel, justly and honestly belongs to the latter. * * * They cannot now be heard in a Court of equity to except to that work being paid out of the fund realized by the labor of these gentlemen, especially when they themselves, these expectants, are seeking to reap the benefit of that very work and labor. We think the Court was clearly right in allowing these fees as a preferred claim."*

As to the allowance of fee to Cross & Marbury, out of the same fund, the same Court thus stated:

*"Somewhat similar principle is applicable, although we are unable, after many consultations, to agree with the Judge of the Circuit Court as to the amount to which these gentlemen are entitled. Their labor resulted in preserving the fund for the North Branch Company. * * * This is also a preferred claim upon the fund in Court."*

A similar principle was applied, and upheld by the Supreme Court of the United States, in the case of *Trustees v. Greenough* (105 U. S. 527) in an opinion by Mr. Justice Bradley. In that case, one Vose, a large holder of bonds of the Florida

Railroad Company filed suit, on behalf of himself and the other bondholders, against one Reed and others, trustees, alleging mismanagement, wasting of funds, etc. The appeal presented the question of the propriety of certain allowances made to Vose out of the trust funds; some of the items of allowance including costs and fees paid attorneys in conducting certain litigation in New York; it being contended that such allowances were improper because Vose was not before the Court in the character of a trustee, and therefore, not entitled to reimbursement of his expenses beyond taxable costs.

The Court there thus stated:

"A considerable amount of money was realized and dividends have been made amongst the bondholders, most of whom came in and took the benefit of the litigation. Vose, the complainant, bore the whole burden of this litigation."

In 1875 Vose filed a petition, set forth his advances and the efforts made by him and prayed an allowance out of the fund for his expenses and service. The matter was referred to a master who, in part, found as follows:

"I further find and report that peculiar and great personal services have been rendered by the petitioner, Francis Vose, in the work of protecting the internal improvement and their sinking funds; those services extending over a period of more than eleven years. By the instrumentality of the suits already mentioned as having been instituted by him, by the agencies he employed and sustained and by his own vigilance and personal efforts he has saved from spoilation and subjected to the decrees of this court a vast domain of over ten millions of acres of land; and has brought into this court large sums of money, which, from time to time, have been distributed by its orders."

And the court goes on further and says :

"As to the point made by the appellants, that the complainant is only a creditor, seeking satisfaction of his debt, and cannot be regarded in the light of a trustee and, therefore, is not entitled to an allowance for any expenses or counsel fees beyond taxed costs as between party and party, a great deal may be said. In ordinary cases the position of the appellants may be correct. But, in a case like the present, where the bill was filed not only in behalf of the complainant himself, but in behalf of the other bondholders having an equal interest in the fund ; and where the bill sought to rescue that fund from waste and destruction arising from the neglect and misconduct of the trustees, and to bring it into court for administration according to the purposes of the trust ; and where all this has been done, and done at great expense and trouble on the part of the complainant ; and the other bondholders have come in and participated in the benefits resulting from his proceedings ; if the complainant is not a trustee, he has at least acted the part of a trustee in relation to the common interest. He may be said to have saved the fund for the *cestuis que trust* and to have secured its proper application to their use. There is no doubt, from the evidence, that besides the bestowment of his time for years almost exclusively to the pursuit of this object, he has expended a large amount of money for which no allowance has been made. *It would be very hard on him to turn him away without any allowance except the paltry sum which could be taxed under the fee bill.* It would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. *He has worked for them as well as for himself ;* and if he cannot be re-imbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution."

And the Court further adds :

"But the complainant was not a trustee. He was a creditor, suing on behalf of himself and other creditors for his and their own benefit and advantage. The reasons which apply to

his expenditures, in carrying on the suit and reclaiming the property subject to the trust, do not apply to his personal services and private expenses. We can find no authority whatever for any such charge by a person in his situation. Where an allowance is made to trustees for their personal services, it is made with a view to secure greater activity and of reliable character and business capacity to accept the office of trustee. These considerations have no application to the case of a creditor seeking his rights in a judicial proceeding. It would present too great a temptation to parties to intermeddle in the management of valuable property or funds in which they have only the interest of creditors, and that perhaps only to a small amount, if they could calculate upon the allowance of a salary for their time and of having all their private expenses paid. Such an allowance has neither reason nor authority for its support."

Speaking in the case of the Central Railroad etc., etc. Co. vs. Pettus, 113 U. S., page 916, Mr. Justice Harlan says:

"It thus appears that, by the suit instituted by Branch Sons & Co., and others, the property was brought under the direct control of the Court, to be administered for *all* entitled to share the fruits of the litigation."

In the case at bar, had it not been for the labor of Mr. Gates no property to speak of could have been brought under the control of this court.

And in the same case Mr. Justice Harlan, continuing says:

"The Court below did not err in declaring a lien upon the property in question, to secure such compensation as appellees were entitled to receive; for, according to the law of Alabama, by one of whose courts the original decree was rendered, and by which law this question must be determined, an attorney at law, or solicitor in chancery has a lien upon a judgment or decree obtained for a client to the extent the latter has agreed to pay him; or, if there has been no specific agreement for compensation, to the extent to which he is entitled to recover,

viz: Reasonable compensation for the services rendered. Ex parte Lehman, 59 Ala. 632; Warfield v. Campbell, 38 Id., 527. That lien could not be defeated by the corporations which owned the property purchasing the claims that were filed by creditors under the decree. The lien of the solicitors rests, by the law of that State, upon the basis that he is to be regarded as an assignee of the judgment or decree, to the extent of his fees, from the date of its rendition."

And in the case of *In re Gillaspie*, 190 Fed. page 91, Judge Dayton very well says:

"The only proper cases that can arise where courts of equity and bankruptcy as well can award compensation to an attorney out of funds due others than his client is where, as I have heretofore indicated, such an attorney for one of a class has "created" or secured a fund and brought it into the custody of the court, which fund is to inure, not alone to the benefit of his client, but to that of all those belonging to this class. In such cases the courts award compensations to the attorney out of the fund due to all, *not on the theory of his having an attorney's lien, but on the broader theory that all interested in the fund should contribute ratably to the cost of "creating" or securing it.* These principles are very clearly set forth in *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157; *Central Railroad v. Pettus*, 113 U. S. 116, 5 Sup. Ct. 387, 28 L. Ed. 915; *Harrison v. Perea*, 168 U. S. 311, 18 Sup. Ct. 129, 42 L. Ed. 478; *Jefferson Hotel Co. v. Brumbaugh*, (4th Circuit) 94 C. C. A. 279, 168 Fed. 867."

Viewed from any reasonable or legal standpoint we feel that the "motion to dismiss and strike" the second Bill in Intervention of R. Woodland Gates, appellant here, should have been denied and we, therefore, request a reversal of the order or judgment appealed from.

Respectfully submitted,

SWEENEY & MOREHOUSE

and

WILLIAM W. GRIFFIN,

Solicitors for Appellant.

No. 2690

United States
Circuit Court of Appeals
For the Ninth Circuit.

R. WOODLAND GATES,
Appellant,

vs.

COLUMBIA - KNICKER-
BOCKER TRUST COM-
PANY, a corporation,
Trustee,
Appellee.

Filed

FEB 14 1935

F. D. Menckton,
Clerk.

Appellee's Brief.

Upon Appeal from the United States District
Court for the District of Nevada.

GIFFORD, HOBBS & BEARD,
DEY, HOPPAUGH & FABIAN,
Attorneys for Appellee.

A. L. Hoppaugh,
Charles C. Dey,
Of Counsel.

No. 2690

United States

Circuit Court of Appeals

For the Ninth Circuit

R. WOODLAND GATES,
Appellant,

vs.

COLUMBIA - KNICKER-
BOCKER TRUST COM-
PANY, a corporation,
Trustee,

Appellee.

Appellee's Brief.

UPON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR THE
DISTRICT OF NEVADA.

By this appeal, the appellant, R. Woodland Gates, seeks to impress upon 480 acres of land situate in Nevada, alleged to be the property of the Pacific Reclamation Company, a lien to the amount of \$25,000.00 for legal services alleged to have been performed by him for said company between July, 1911, and March, 1913, in the Land Department of the United States. The

legal services are alleged to consist of proceedings had before the General Land Office and the Secretary of the Interior, involving certain relinquishments, script locations and Carey Act reclamation matters involving said lands.

I.

THE APPELLANT IS NOT ENTITLED TO ANY LIEN UPON THE LAND.

There is no claim of any contract or agreement between client and attorney, either express or implied, by which appellant is entitled to a lien upon the land for his legal services.

Appellant seeks to predicate his claim to equitable interference to create a lien upon land in his favor solely upon some supposed right thereto peculiar to attorneys.

It is a new departure, without precedent. It stands unique.

Attorneys have two kinds of lien not possessed by others: One consists of a general lien founded upon possession. It extends to documents, papers and other property in his possession and to money which he has collected, until his costs and charges are paid. This is called a "retaining lien."

1 Jones on Liens (3rd Ed.) Sec. 113-152.

The other, recognized in England and in some of the States in the absence of statutes, consists of a special lien upon the judgment or fund in court which the attorney has recovered, for his services in obtaining the judgment or fund. This lien is commonly called a "charging lien."

Goodrich v. McDonald, 112 N. Y.
157; 19 N. E. 649.

In re Wilson, 12 Fed. 235, 238.

1 Jones on Liens (3rd Ed.) Sec.
153-240.

As said by Earl, J., in Goodrich v. McDonald, *supra*, referring to this lien:

"It is a peculiar lien, to be enforced by peculiar methods. * * The lien was never enforced like other liens. If the fund recovered was in possession or under the control of the court, it would not allow the client to obtain it until he had paid his attorney, and in administering the fund it would see that the attorney was protected. If the thing recovered was in a judgment, and notice of the attorney's claim had been given, the court would not allow the judgment to be paid to the prejudice of the attorney. If paid after such notice, in disregard of his rights, the court would upon motion set aside a discharge of the judgment, and allow

the attorney to enforce the judgment by its process, so far as was needful for his protection. But after a very careful search we have been unable to find any case where an attorney has been permitted to enforce his lien upon a judgment for his services by an equitable action, or where he has been permitted to follow the proceeds of a judgment after payment of them to his client. His lien is upon the judgment, and the courts will enforce that through the control it has of the judgment and its own records, and by means of its own process, which may be employed to enforce the judgment. But after the money recovered has been paid to his client he has no lien upon that, and much less a lien upon property purchased with that money, and transferred to another."

That such a lien does not exist and is not acquired on land the subject matter of litigation, independent of statutory authorization to that effect, either in obtaining or defending title to real estate, is supported by the great weight of authority.

Holmes v. Waymire, 9 Am. & Eng.

Anno. Cases, 624, and notes.

1 Jones on Liens (3rd Ed.) Sec. 229, and cases cited.

A contrary doctrine appears to have pre-

vailed only in Tennessee, where it is held that land in litigation is generally as much in the custody of the law as a pecuniary fund. But even there this lien exists only in case of actual recovery of land in a suit for that purpose, and that it cannot be extended to services which merely protect an existing title or right.

See notes, *Holmes v. Waymire*,
supra.

The appellant invokes the benefit of the statute of Nevada, 2 Revised Laws of Nevada, 1912, Sec. 5376; (Civil Practice Act, Sec. 434), which enacts as follows:

“The compensation of an attorney and counsellor for his services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client’s cause of action or counterclaim which attaches to a verdict, report, decision, or judgment in his client’s favor and the proceeds thereof in whosoever hands they may come, and cannot be affected by any settlement between the parties before or after judgment. There shall be allowed to the prevailing party in any action, or special proceeding in the nature of an action, in the supreme

and district courts, his costs and necessary disbursements, in the action or special proceeding.”

This section is found in the Civil Practice Act. It will be observed that the statute contemplates “an action”; that the lien is upon “his client’s cause of action or counterclaim”; that it attaches to “a verdict, report, decision or judgment in his client’s favor and the proceeds thereof in whosoever hands they may come”; that it “cannot be affected by any settlement between the parties before or after judgment.”

That statute (even if available to appellant, a proposition that we confidently question) in no way whatever supports his claim for a lien upon the land.

The statute has no application to “an action” in courts of another state or jurisdiction, it applies only to an action in local courts in the state of Nevada.

Plummer v. Great Northern Ry. Co.
(Wash.) 110 Pac. 989; 31
L. R. A. (N. S.) 1215.

In *Mass. & S. Const. Co. v. Township of Gill’s*, 48 Fed. 145, 147, Simonton, J., referring to the lien of attorneys, says:

“This protection of attorneys, in the absence of a statute, is given by

each court to its own officers. This court would not—perhaps I should say could not—extend the protection to services rendered in another wholly distinct jurisdiction.”

The statute of Nevada has no possible application to proceedings *ex parte* or otherwise before the political department of the government of the United States, or of a State.

The Land Department is a special tribunal, vested with certain judicial powers, to hear and determine claims to public lands and make conveyances to the parties entitled thereto. The proceedings are not “an action,” as contemplated by the Civil Code of Nevada.

The Nevada statute is identical with the New York statute of 1879.

N. Y. Code of Civil Procedure, Sec. 66.

This statute of New York remained unchanged until 1899, when it was amended to include the words “or special proceeding” following the words “from the commencement of an action,” and also to include the words “or final order” following the words “verdict, report, decision or judgment.” (Now Sec. 475 of the Judiciary Laws; Laws of 1909 c 35, being Chapter 30 of the Consolidated Laws.)

In *Morey v. Schuster*, 145 N. Y. S. 258, a

lien was claimed by attorneys employed to procure legislation authorizing the commissioners of the land office to convey land to the holder of a certificate of sale without further payment therefor and to procure the issuance of a patent by the land office. The court held that the attorneys had no lien on the land for their services under the New York statute as amended in 1899, nor under the law as it existed unaffected by the statute. In considering the claim of a lien for services in procuring the legislation authorizing and the land patent issued pursuant thereto in connection with perfecting defendant's title to the premises and releasing them from payment to the state of the balance of the purchase price unpaid, the court says: (p. 264)

“It is doubtless true that, independently of any statutory provision, plaintiffs would be entitled to an attorney's retaining lien for the value of such services, provided there was anything belonging to the defendants, which had come to plaintiffs' possession or control in their professional capacity. *Matter of Knapp*, 85 N. Y. 284; *Ward v. Craig*, 87 N. Y. 550. But here there is nothing. Neither is there any ‘verdict, report, decision, judgment’ or ‘final order in the client's favor’ or ‘proceeds thereof’ bringing the claim within the

equitable control of the court, under the statute. It is only, as the statute provides, 'from the commencement of an action or special proceeding, or the service of an answer containing a counterclaim,' that the statutory lien of an attorney attaches. These services did not, and in the nature of things could not, involve the expressed prerequisite of such a lien of either the commencement of an action or special proceeding or the service of an answer containing a counterclaim. It is true that these services in completing and perfecting defendants' title to the premises were performed while the ejectment action was still in its final issue undetermined. But these services were to an end distinct and separate from the conduct of the ejectment action the result of which was in no way dependent upon their success or failure."

In *Deering v. Schreyer*, 52 N. Y. S. 203 (affirmed, (memorandum decision) 157 N. Y. 678), James Deering presented a petition to the supreme court entitled "In the Matter of the Opening of Lexington Avenue." The proceedings were commenced to acquire title to land. Commissioners were appointed and John Schreyer, the owner of the property, employed the petitioner as attorney to take necessary proceedings to obtain compensation for the land

sought to be taken. \$22,500.00 was awarded for the land, which sum remained in the hands of the comptroller of New York City. The petitioner asked for a lien. Schreyer answered that the award was made in a special proceeding and not in "an action." The question arose upon the statute prior to the amendment referred to. In denying the lien, the court say:

"Section 66 of the Code does not apply. It is therein provided:

'From the commencement of an action or the service of an answer containing a counterclaim the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor, and the proceeds thereof, in whosesoever hands they may come; and cannot be affected by any settlement between the parties before or after judgment.'

The lien given by this section appears to apply only to causes of action to enforce which an action had been commenced, or to recover which an answer containing a counterclaim had been served. The distinction between actions and special proceedings is recognized all through the code."

This same distinction is practically recognized in Nevada. In *Haley v. Eureka County*

Bank, 21 Nev. 127, 137, the court says:

“An action is a legal prosecution by a party complainant, against a party defendant, to obtain the judgment of the court in relation to some right claimed to be secured, or some remedy claimed to be given by law to the party complaining.”

Whether a special proceeding is or is not deemed “an action” in courts of justice, is quite immaterial to our inquiry here. The legal services for which the claim to a lien upon the land is invoked were not associated with any action or special proceeding in any court of justice. They were confined exclusively to sundry matters cognizable by the Land Department.

In speaking of that department, the objects of its creation and the powers it possessed, in *Steel v. Smelting Co.* 106 U. S. 447, 450-1, Mr. Justice Field said:

“That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with.”

The charging lien, whether by statute or independent of statute, has never been extended

to legal services in the Land Department or other executive or legislative department of the government, federal or state. It exists only in the department of courts of justice and there only in case of suits or actions and within restricted limits and upon certain essential prerequisites.

Inasmuch as appellant by his appeal invokes this court to transcend the long and firmly established basis, limits and requirements in respect to a charging lien, and adjudge him to be entitled to a lien upon the land, it is permissible to inquire what did the legal services consist of that would furnish a basis for a lien? They did not either create or reclaim the land, neither did they add any intrinsic value to the land. They could not do that. Nor does it appear that there was even any contest inaugurated, or that any adverse claim was made in the Land Department by any person against the acquisition by appellant's client of the land from the government. The only controversies appear to have been raised by the officers of the Land Department in the performance of its duty, and that particularly in respect to an irregularity suggesting the question, viz., whether the entry of the public land made by the agent

of appellant's client, the agent being also a deputy mineral surveyor, was permissible.

We gather from the appellant's second bill in intervention that prior to the employment of appellant the Pacific Reclamation Company had lawfully entered the 480 acres of land and was in possession thereof. That it had made thereon numerous and extensive improvements of great value, and that it had mortgaged the lands to the Columbia-Knickerbocker Trust Company, trustee, appellee herein. That for some reason, not disclosed, the Reclamation Company desired to have the character of entry changed and to that end applied for a relinquishment. That pending that application appellant was employed and the desired relinquishment was secured. That thereupon the land was entered by the company's then agent, George M. Bacon, for the benefit of the Pacific Reclamation Company under land script entries. That the department ascertained that Mr. Bacon was also a deputy mineral surveyor and held up the script entries pending investigation of the question as to his qualification to make the entry. That appellant secured a favorable ruling. (Tr. 15-26.)

Appellant's original bill however included also legal services alleged to have been per-

formed by him in securing from the Executive Department of the government a location of a post office upon the land as a basis for the lien he claims. (Tr. 3.) Appellant omitted to mention that service in his second bill, or to make any corresponding reduction in the amount of his claim of \$25,000.00 on account of such services, notwithstanding it is quite probable that service may have materially tended to increase the market value of the land.

The proposition that appellant is entitled to a lien upon the land is too absurd, to be seriously considered by this court. No state statute for the protection of attorneys for their reasonable compensation in case of recovery in its courts of justice was ever intended to afford and include protection for legal services in the Land Department at Washington, by way of lien upon land entered or purchased. If such a lien as is prayed for is to be allowed, we submit it will require an express act of Congress before any court will sanction or award it.

In *Humphrey v. Browning*, 46 Ill. 476, the court aptly said:

“It may be a lawyer’s services in recovering a tract of land by suit are as meritorious as those of a carpenter or mason who builds a house; but the latter

had no lien until it was given to them by an express statute.”

II.

APART FROM THE QUESTION OF APPELLANT'S RIGHT TO A LIEN UPON THE LAND, THE ORDER OR DECREE APPEALED FROM SHOULD BE AFFIRMED.

Not only was the order appealed from proper, but the entire second bill in intervention should have been stricken.

To clearly present the situation, we refer to the proceedings in the order of their occurrence:

July 7, 1914, the intervener, R. Woodland Gates, filed a petition in intervention. (Tr. 1-7.)

July 23, 1914, the appellee, Columbia-Knickerbocker Trust Company, trustee, filed a motion to dismiss and strike from the files the bill in intervention filed by R. Woodland Gates, upon the ground “that it appears upon the face of the bill that the same is insufficient in fact to constitute a valid cause of action in equity, and that the allegations therein contained are insufficient to entitle the said intervener, R. Woodland Gates, or any other person, to any relief against the Columbia-Knickerbocker Trust Company”; also moved to strike out paragraph nine and the portion of the prayer

for a lien upon the 480 acres of land. (Tr. 9-12)

October 10, 1914, the court made its order granting the motion to dismiss, and allowed the intervener "twenty days within which to take such steps as he may be advised." (Tr. 12-14)

November 21, 1914, R. Woodland Gates presented another bill in intervention. (Tr. 15-27.)

November 21, 1914, Columbia-Knickerbocker Trust Company, trustee, filed a motion not only to strike out paragraphs XIV and XX and the portion of the prayer seeking a lien on 480 acres of land, but also to strike out the entire bill in intervention on the ground that the matters and things in the bill in intervention were adjudged and determined on the merits against the intervenor Gates by the former order or decree. (Tr. 28-30.)

July 24, 1915, the court filed an opinion (Tr. 31-39) in which it is said, (Tr. 34-35) :

"The trust company also urges that the subject matter on which the lien is based, the lien claimed and the so-called tribunal in which the services were rendered, are identical in both bills, and were disposed of by the decision of October 10, 1914.

The last objection is well taken. The claim is to precisely the same lien

which is urged in the original bill, and is foreclosed by the decision referred to."

July 24, 1915, the court by its order (being the order appealed from) struck out the paragraphs referred to, but made no disposition of the motion to strike out the entire bill. (Tr. 30-31.)

The two bills are in every material and essential particular the same. The additional facts and conclusions contained in the second bill are set forth in the opinion of the court. (Tr. 33-34.) They are unimportant and do not change the status. The former order or decree dismissing the bill not having been set aside or appealed from was conclusive and the second bill should have been stricken out in toto.

Nor. Pac. Ry. Co. v. Slaght. 205
U. S. 122.

Lindsley v. Union Silver Star Min.
Co. (C. C. A. 9th Cir.) 115 Fed.
46.

The motion to dismiss is a substitute for a demurrer. By Rule 29 of the new rules of equity practice (198 Fed. XXVI, 115 C. C. A. XXVI) demurrers and pleas are abolished and a motion to dismiss substituted therefor.

Appellant's second bill in intervention does

not purport to be an amended bill. If, however, it could be treated as an amended bill, in pursuance to the permission granted the intervenor "to take such steps as he may be advised," and for that reason the order dismissing the original bill is not *res judicata*, the effect in our opinion would be no different.

The right to amend a bill when leave is granted for that purpose, does not contemplate that the averments of the original shall be practically restated. When an amended complaint is in effect but a repetition of the one it purports to amend, a motion to strike, for that reason alone, apart from the question of *res judicata*, is well taken. A comparison of the two bills discloses that there is no difference in the two as to the statement of ultimate facts, although evidential matters were given in somewhat different and greater detail in the second bill. It is difficult to perceive how that would make the change material. Moreover it is apparent that the appellant, by not appealing from the order dismissing the original bill on the merits and by filing another bill incorporating no material fact not found in the first or original bill, cannot be heard to complain of the order of the court in striking out parts or portions of such second bill, when it would have

been justified and upheld in striking out the entire bill.

We respectfully submit that the order appealed from should be affirmed.

GIFFORD, HOBBS & BEARD,

DEY, HOPPAUGH & FABIAN,

Attorneys for Appellee.

A. L. Hoppaugh,

Charles C. Dey,

Of Counsel.

No. 2690.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

R. WOODLAND GATES,

Appellant,

VS.

COLUMBIA-KNICKERBOCKER TRUST COM-
PANY, a Corporation, Trustee,

Appellee.

APPELLANT'S REPLY BRIEF

Upon Appeal From the District Court of the United States
for the District of Nevada

SWEENEY & MOREHOUSE
and W. W. GRIFFIN,

Solicitors for Appellant.

Filed this.....day of March, A. D. 1916.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

Filed

MAR 16 - 1916

F. D. Monckton,

Clerk

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

R. WOODLAND GATES,

Appellant,

VS.

COLUMBIA-KNICKERBOCKER TRUST COM-
PANY, a Corporation, Trustee,

Appellee.

PLAINTIFF'S REPLY BRIEF

Upon Appeal from the United States District Court
for the District of Nevada.

Replying to paragraph I of the brief of counsel for the Columbia - Knickerbocker Trust Company, appellee, there is one thing that stands forth pre-eminently, and that is, that Gates made the fund the proceeds of which the appellee, Columbia-Knickerbocker Trust Company, is now trying to get hold of.

But for Gates' professional efforts and labor there would have been no "480 acres of land situated in Nevada" now sold, and which is alleged to be the property of Pacific Reclamation Company; and had there been no land there would have been neither fund nor money for the appellee to get its hand on.

On page five of its brief, appellee seems to take the position that Gates' services merely resulted in the protection of an existing right, and not in an actual recovery of land. This is a misstatement of the facts appearing in the petition. The fact is that the Reclamation Company had no title when Gates was employed, by virtue of Section 452, Revised Statutes, which prohibits employees of the land office from making applications for public land.

There is also another misstatement upon this question at pages 12 and 13 of appellee's brief. It is said there that the land office merely *suggested* the irregularity of the application in regard to Section 452. This is not true. The Commissioner actually rendered a decision adverse in character to the application. The Commissioner decided that the above section left him without any discretion; so that it cannot be said that there was an existing title at the time Gates was employed.

The case of *Holmes vs. Waymire*, 9. Am. & Eng. Anno. Cases 624 and notes, cited by counsel in appellees' brief, cannot afford any great comfort to him. In the first place, the Kansas statute differs materially from the Nevada statute; and secondly, in the case at bar there is a "fund," and a large one, now in the hands of the District Court of the United States for the District of Nevada—a fund the money proceeds of which—being the proceeds of the 480 acres of land referred to in the complaint in intervention of Gates—is all that there is to fight over.

The Nevada statute says "the attorney has a lien

. . . on any decision in his client's favor and *the proceeds thereof* in whosoever hands they may come." The proceeds have come into the hands of the lower court and are still there in sufficient quantity to protect Mr. Gates.

Surely there was a decision in the General Land Office and the Department of the Interior in favor of the Pacific Reclamation Company—*Gates' client*—inasmuch as Gates' petition in intervention so alleges and it must be taken as true for the purposes of this appeal.

It has been held in *Kappler vs. Sumpter*, 33 Appeal Cases (D. C.), at page 408, that if the attorney could not recover his fee in the Interior Department he could do so by action in another court having jurisdiction in the premises. Why not, then, in the District Court of the United States for the District of Nevada, where the fund or money, the proceeds of the 480 acres of land, now is? Has not that court jurisdiction in the premises?

Counsel seeks to sustain his attitude by

Plummer vs. Great Northern Ry. Co., 110 Pac. 989; 31 L. R. A. (N. S.) 1215.

but the case is not in point, because in the case at bar there was certainly a *decision* in the Pacific Reclamation Company matter and a recognized decision of the General Land Office and the Department of the Interior; else there could not have been any land, and consequently not any fund or money, in the hands of the Pacific Reclama-

tion Company prior to the institution of the suit of *Gutman et al. vs. Pacific Reclamation Company*. THERE WAS A DECISION IN FAVOR OF THE PACIFIC RECLAMATION COMPANY, AND SUCH A DECISION AS WOULD BRING GATES' CLAIM WITHIN THE EQUITABLE CONTROL OF THE DISTRICT COURT OF THE UNITED STATES FOR NEVADA, UNDER THE STATUTES OF THAT STATE.

In *Deering vs. Schreyer*, 52 N. Y. S. 203, there was *no cause of action to enforce which an action had been commenced*. In the case at bar Gates began an action before the General Land Office to obtain the land and to secure it to the Pacific Reclamation Company.

There is merit, we, too, respectfully suggest in the quotation of counsel from *Haley vs. Eureka Co.*, 21 Nev. 127, cited in counsel's brief at page 11, and certainly in the case at bar there was a legal prosecution by a party complainant (the Pacific Reclamation Company) to obtain a *decision* of the General Land Office and the Department of the Interior "*in relation to some right claimed to be secured or some remedy claimed to be given by law to the party complaining.*"

Indeed, contrary to views of counsel for the appellee, expressed on page 12 of their brief, we contend that in so far as the Pacific Reclamation Company is concerned, Gates' services did create the land

and added intrinsic value to the land created. A careful reading of the proceedings as set forth in the Gates Bill in Intervention will convince this Court as to the righteousness of Gates' claim.

Strange, too, that counsel inadvertently perhaps, on page 14 of his brief, admits "that notwithstanding it is quite probable that service may have materially tended to increase the market value of the land." What land? we ask. It must needs be the 480 acres secured to the Pacific Reclamation Company through Gates' efforts.

We contend, too, that the lien to Gates was given by the provisions of section 6376 of 2 Rev. Laws of Nevada, 1912 (Civil Practice Act, sec. 434).

It may not be amiss to enlarge somewhat upon the subject.

That Equity has jurisdiction to enforce liens, whether on real or personal property, is clear.

2 Story Eq. Jur., Sec. 1216;

1 Whit. and T. Lead. Cases Eq. 1108, Note to *Cuddy vs. Rutter*.

The foregoing doctrine stands approved in the case of

Hooly Mfg. Co. vs. New Chester Water Co.,
48 Fed. Rep. 891.

In *Fletcher vs. Morey*, 2 Story 555, 565, Judge Story said "In equity there is no difficulty in enforcing a lien or any other equitable claim constituting a charge *in rem*, not only against real estate but upon

personal estate or upon money in the hands of third persons," etc., and this doctrine was affirmed in

Tuttle vs. Claflin, 88 Fed. Rep. 122.

A case not dissimilar in principle to the Gates case is *Needles et al. vs. Smith et al.*, 87 Fed. Rep 316, in which it is held that Attorneys have a lien "superior to the claim of one to whom such securities are afterwards pledged to secure a lien."

It is not disputed and cannot be that the land obtained through the efforts of Gates for the Pacific Reclamation Company was afterwards pledged as security for a mortgage to the Columbia-Knickerbocker Trust Company, appellee here.

In *Funk vs. McComb*, Judge Dallas cites approvingly the opinion of Lord Kenyon in *Read vs. Dupper*, 3 Term R., page 361, in which that distinguished jurist observes:

"The principle by which this application is to be decided was settled long ago, viz.: that a party should not run away with the fruits of the cause without satisfying the legal demands of his Attorney, by whose industry and in many instances, at whose expense, those fruits are obtained."

The principle thus enunciated has now been established for about a century longer than when Lord Kenyon referred to it as having been settled long ago and is at this date so fully recognized as not to be open to question.

60 Fed. 488.

To the same effect is *Mahone vs. Tel. Co.*, 33 Fed. Rep., pages 704, 705.

Counsel for appellee throughout the proceedings in the Court below and here seek to impress the fact that "the legal services for which the claim to a lien upon land is invoked, were not associated with any action or special proceeding in any Court of Justice." (See appellee's brief, page 11.)

That that argument will not hold has been settled by many cases, the most important of which are *Stanton et al. vs. Embrey, Administrator*, 93 U. S. at page 566, and *McGowan vs. Parish*, 237 U. S. at page 285.

In the former case, services were rendered by Robert J. Atkinson, in his lifetime, as Attorney for the defendants, in prosecuting a claim in their behalf against the United States before the accounting officers of the Treasury Department, and the plaintiff instituted the suit in the Supreme Court of the District to recover compensation for those services since the decease of the intestate. These services were not associated *with any action or special proceeding in any Court of Justice*. The proceeding was before the officers of the Treasury Department just as the proceeding in the Gates case was before the officers of the Interior Department. In that case the Court, speaking through Mr. Chief Justice Clifford, said:

"Professional services (before the Treasury Department or other departments) to prepare and advocate just claims for compensation, are as legitimate as services rendered in Courts in

arguing a case to convince a Court or jury that the claim presented or the defense set up against a claim presented by the other party ought to be allowed or rejected. Parties in such cases require advocates; and the legal profession must have a right to expect such employment, and to receive compensation for other services."

In *McGowan against Parish*, McGowan sought to establish and enforce a lien upon a fund for services in prosecuting what was known as the "ice claims" before Courts. The Court observing that "a Court of equity should do justice completely and not by halves, and should retain the cause for all purposes even though it be thereby called upon to determine legal rights otherwise beyond its authority;" held that McGowan, who had rendered substantial services, was entitled to his compensation therefor.

In *Wylie against Cox*, 15 Howard 415, the Supreme Court says:

"Professional services were rendered by an attorney, in the first case cited, in prosecuting a claim against the Republic of Mexico, under a contract that the Attorney was to receive five per cent of the amount recovered. Valuable services were rendered by the Attorney during the lifetime of the claimant; but he died before the claim was allowed. Subsequently, the efforts of the Attorney were successful; and he demanded the fulfillment of the contract, which was refused by the administration of the decedent. Payment being refused, the Attorney brought suit; and this Court held that the decease of the owner of the claim did not dissolve the contract, that the claim remained a lien upon the money when recovered, and that a Court of equity would exercise juris-

diction to enforce the lien, if it appeared that equity could give him a more adequate remedy than he could obtain in a Court of law."

In the case of Ingersoll against Coram, Robert G. Ingersoll, or rather Mrs. Ingersoll, acting after his death, sought to enforce a lien against the distributive share of an heir in the hands of an administrator. In the case at bar, Gates seeks to enforce a lien on land or money in the hands of a Receiver.

The Supreme Court, in the Ingersoll case, speaking through Justice McKenna, said:

"On the merits there are two proposition: (1) Did the complainant establish the existence of a debt due from Coram and Root to Ingersoll? (2) Did she establish the existence of a lien? As to the first proposition the Court held that:

"The evidence leaves no doubt that it (the result in the case) was brought about 'by the force, effect and stress' of the contest and by the services, which it is admitted Ingersoll rendered."

In the case at bar the services alleged by Gates in his appeal must, for the purpose of this appeal, be considered as admitted. As to the second point, the Court held that the arrangement between Ingersoll and Coram served to stamp the agreement in issue as declaring a purpose to create a lien. There can be no doubt that the agreement between Gates and the Pacific Reclamation Company in regard to the services which Gates was to perform, and *thereafter did perform*, before the General Land Office and the Department of the Interior served to stamp the agree-

ment in issue as declaring a purpose to create a lien. This same doctrine is upheld in *In re Paschal* in which it was held that in accordance with the prevailing rule in this country Paschal had a lien on the fund for disbursements and professional fees.

The case was cited in *McPherson vs. Cox*, 96 U. S. 404, and the doctrine repeated, and also in *Central Railroad vs. Pettus*, 113 U. S. 116, and in other cases.

In the *Central Railroad vs. Pettus*, 113 U. S., the Supreme Court of the United States, speaking through Mr. Justice Harlan, observed:

“An equitable lien may also arise in the absence of an expressed contract out of general considerations of right and justice, based upon these maxims which lie at the foundation of equitable jurisprudence.”

25 Cyc. 667.

Unless the statute expressly forbids it, the jurisdiction of equity lies for the purpose of granting relief under any circumstances.

Pomeroy's Eq. Jur., Vol. 1, Section 279;
Greil Bros. Co. vs. City of Montgomery, 182 Ala. 291.

As to paragraph II, of Appellant's Brief, we contend that we filed, as we had a right to do, a second or amended Petition in Intervention and that the Second or Amended Petition was accepted and received by the lower Court, as such.

See transcript, page 58, “The Court.”

A careful reading of it will show that the Second Petition in Intervention was an amended Petition and that it contains several paragraphs which were not included in the original Bill.

See transcript, page 33.

We respectfully submit, therefore, that the "Motion to Strike" should have been overruled, and that the order appealed from should be set aside.

SWEENEY & MOREHOUSE
and W. W. GRIFFIN,
Solicitors for Appellant.

No. 2690.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

R. WOODLAND GATES,

Appellant,

v.

COLUMBIA KNICKERBOCKER TRUST COMPANY,
a Corporation, Trustee,

Appellee.

APPELLANT'S PETITION FOR REHEARING.

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By, Deputy Clerk.

Rincon Pub. Co., 680 Stevenson St., S. F.

Filed

JUL 8 - 1916

F. D. Monckton,

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Appellee.

APPELLANT'S PETITION FOR REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

In the opinion of this Honorable Court affirming the order of the District Court, the principal views of the lower court upon the questions under consideration are reiterated and to a great extent adopted.

Judge Farrington based his order upon the determination that Gates, the intervenor, had not brought himself within the Nevada statute providing for attorneys' liens, and therefore had no right to one. In other words, the consideration of the question went only so far as to inquire whether or not there existed a statutory lien. There was no expression at all from

the lower court as to the equitable right of Gates to a lien.

Although upon appeal to this Court, Gates urged that aside from the Nevada statute, his rights were protected by the principles of equity, this Court rather decided the question upon a consideration of his statutory right, as did Judge Farrington. This Court may have felt that the principal question before it, as presented by the record, was the appellant's statutory right. However, the appellant feels now that there is a broader principle applicable to the right which he seeks to enforce, and for that reason he feels constrained to ask this Court to give these principles consideration before its previous judgment becomes final. It is for this reason that this petition for a rehearing is filed, and to simplify its consideration we shall address ourselves only to the question of the right to an equitable lien.

At the threshold, let us remark that this is essentially a bill in equity. The Court will, by the very nature of the proceeding, exercise its equitable jurisdiction and administer justice upon broad principles of equity, without confining itself to statutory limits. In fact, it would ultimately have been compelled to do so in order to adjudicate the several rights of the different parties. After the title of the property in question vested in the Pacific Reclamation Company, and even before Gates' services were at an end, a court of equity was given possession of the property, with jurisdiction to distribute it according to equity and justice. Therefore, if a party go into that court, demanding rights con-

nected with that property, should not such rights be considered in the light of equity and justice? Courts of chancery were created for the purposes of administering justice where strict, narrow and inadequate laws failed.

“Unless the statute expressly forbids it, the jurisdiction of equity lies, for the purpose of granting relief under any circumstances.”

Pomeroy's Eq. Jur., vol. 1, sec. 279.

Greil Bros. Co. v. City of Montgomery, 182 Ala. 291.

“An equitable lien may also arise in the absence of an express contract, out of general considerations of right and justice, based upon the maxims which lie at the foundation of equitable jurisprudence.”

25 Cyc. 667.

It is useless to cite authorities to sustain the proposition that equity courts have always given a helping hand to attorneys to enable them to recover just compensation for their services.

“There can be no doubt that from an early period courts have always interfered in securing to attorneys the fruit of their labors, even against their own clients (7 Vin. Abr. 74). This is an equitable interference on the part of the court (12 Mecs. & W., 441). The enforcement of a claim or right on the part of the attorney to ask the intervention of the court for his own protection where he finds there is a probability that his client will deprive him of his costs (L. R. 7 Q. B. 499); for the want of a better word, it is called a ‘lien’; but this so-called lien is limited to the funds collected in the particular case in which the services were rendered (12 Fed. 235). This

is the rule followed by all courts, without requiring the sanction of a statute."

Mass. & So. Construction Co. v. Township, 48 Fed. 145.

The lower court had full jurisdiction and control over the property and its distribution. For the purpose of declaring an attorney's lien upon this property, the court could consider only broad principles of justice and equity, and could have closed its eyes to any statutory limitation whatever.

"No abridgment of the equity jurisdiction of the state courts by state law would restrict or impair the chancery jurisdiction of the Federal Court sitting in that state."

Payne v. Hook, 7 Wall 425, 19 L. ed. 260.

Green v. Creighton, 23 How. 90, 16 L. ed. 419.

Holland v. Challen, 110 U. S. 15, 28 L. ed. 52, 3 Sup. Crt. Rep. 195.

Gormley v. Clark, 134 U. S. 338, 33 L. ed. 909 10 Sup. Crt. Rep. 554.

Bardon v. Land & River Imp. Co., 157 U. S. 327, 39 L. ed. 179, 15 Sup. Crt. Rep. 650.

Rich v. Braxton, 158 U. S. 405, 39 L. ed. 1032, 15 Sup. Crt. Rep. 1006.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Crt. Rep. 418.

A court of equity can exercise jurisdiction over the case, if a more adequate remedy can be thus obtained than in a court of law.

Wylie v. Cox, 14 L. ed. 414.

In touching upon the particular question which we here urge, this Court, in its opinion, relied on the remarks of Judge Earl, in *Goodrich v. McDonald*,

112 N. Y. 162, 19 N. E. 649. It was there intimated that an attorney could not enforce his lien on a judgment in an equitable action. We submit that such is not the rule applicable to a *charging lien*, such as the one at bar. In a very recent decision of the Circuit Court of Appeals for the Second District, the principle is definitely declared:

“Apart from statutes, courts of equity recognize an attorney’s lien on the judgment secured by him, as courts of common law did not, since possession is not essential to an equitable lien. . . . The two (a retaining lien and a charging lien) are different in their nature, and the rules applicable to the one are not necessarily applicable to the other. An attorney’s lien on a judgment is not recognized at common law unless declared by statute, but the lien on the papers is. The reason for that distinction is that the common law only recognizes liens acquired by possession. Courts of equity, however, recognize the lien on the judgment, possession not being essential to an equitable lien.”

Everett etc. v. Alpha Portland C. Co., 225 Fed. 931.

We think that Judge Earl’s remarks in the above mentioned case were applicable only to those liens which involve the question of possession. It is undoubtedly true, as he said, that after the money recovered has been paid to the client, the attorney’s lien is gone, and let it be remarked that he is speaking particularly of funds of money and personal property, subject to actual possession by the attorney, but no such general rule exists to the effect that equity cannot interfere to declare a lien where under different cir-

cumstances and exigencies the justice of a particular situation may demand it, no matter what the kind or character of the property in question.

We call the court's attention to the fact that the property in question here has not gone beyond the reach of the lien claimant in the sense that it has gone from the possession and ownership of the client; it is true that the client, Pacific Reclamation Company, has made a mortgage conveyance of the property, in the form of a trust deed, which, however, transferred neither ownership nor possession. For the present purposes, the title of the property is still in the client, and of course any vested rights subsequently acquired by the Columbia Knickerbocker Trust Company will be subsequent to Gates' lien. They can never be heard to say that they had no notice of the lien, because even while holding some imperfect and inchoate rights under the trust deed, they made no objection to the contract of employment of Gates, or the performance by him of his services. Obviously they would not do so. They knew that Gates, by those particular services, was obtaining for their grantor and for their benefit the very property which was the subject of their deed from the Pacific Reclamation Company. In such situations as these, equity has not refused to follow the property, and allow the lien.

“In equity there is no difficulty in enforcing a lien, or any other equitable claim constituting a charge in *rem*, not only against real estate but upon personal estate, or upon money in the hands of third persons.”

Fletcher v. Morey, 2 Story 555.

Tuttle v. Claflin, 88 Fed. 122.

Needles v. Smith, 87 Fed. 316.

Neither does the filing of the Gutman action and the appointment of the receiver therein remove the property from the reach of the lien claimant. But it places it, as we have before suggested, under that control to which Gates must of necessity look in order to obtain his rights.

In its opinion, this Court remarked that appellant had made no showing from which it is to be inferred that it was the purpose of the parties interested to impress a lien of any kind upon the four hundred and eighty acres involved in the proceedings before the Interior Department. For the purposes of equity, are not the allegations of the bill sufficient to show that it was the implied purpose of the parties to create a lien in favor of the attorney? In Paragraph III it is alleged in substance that Gates was employed as attorney for the particular purpose of attending to all of the business of the Company which it might have before the General Land Office, or the Department of Interior, but more especially in regard to certain suits then pending or about to be commenced. It is then alleged, in Paragraph V, that these particular suits involved the securing to the company of the four hundred and eighty acres, and it is finally alleged that continually during his period of employment the attorney was performing professional services, particularly in prosecuting said suits.

Of course, it must be admitted that the allegations of the complaint could have been made more

specific, for the purpose of more definitely showing the intent of the parties. Such a defect as this is subject to a motion to make more certain, which is the proper way to reach it, but to say that on account of such defect the bill does not sufficiently set forth the party's equitable rights, goes beyond the limits of the rules governing proper construction of pleadings.

The court has thoroughly considered the right of the intervenor to a statutory lien. We are satisfied that it has fully advised itself upon this point, and that the decision is correct, but we beg leave by this petition to ask that the court consider the rights of this attorney to his lien according to the rules and principles of equity. We feel that the circumstances of the case, even as set forth in the bill, call for the interposition of a court of equity, so that substantial justice may be done.

Respectfully submitted,

THEODORE A. BELL,
Attorney for Appellant.

Dated: July 8, 1916.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for the appellant and petitioner in the above entitled cause, and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition is not interposed for delay.

THEODORE A. BELL,
Attorney for Appellant and Petitioner.

United States
Circuit Court of Appeals
For the Ninth Circuit.

SECURITY TRUST & SAVINGS BANK, a Corporation, as Trustee in Bankruptcy of
FIELDING J. STILSON COMPANY, a Corporation, Bankrupt,

Appellant,

vs.

WM. R. STAATS COMPANY, a Corporation, and
TITLE INSURANCE & TRUST COMPANY, a Corporation,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court
for the Southern District of California,
Southern Division.

Filed

DEC 23 1915

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

SECURITY TRUST & SAVINGS BANK, a Corporation, as Trustee in Bankruptcy of
FIELDING J. STILSON COMPANY, a Corporation, Bankrupt,

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Names and Addresses of Attorneys.

For Appellant:

WILLIAM T. CRAIG, Esq., 701 Higgins Building, Los Angeles, California.

For Appellees:

Messrs. O'MELVENY, STEVENS & MILLIKEN and WALTER K. TULLER, Esq.,
825 Title Insurance Building, Los Angeles,
California. [4*]

*In the District Court of the United States, Southern
District of California, Southern Division.*

SECURITY TRUST & SAVINGS BANK, a Corporation, Trustee in Bankruptcy of FIELD-
ING J. STILSON COMPANY, a Corporation,
Bankrupt,

Complainant,

vs.

WM. R. STAATS COMPANY, a Corporation, and
TITLE INSURANCE & TRUST COMPANY, a Corporation,

Defendants.

Citation on Appeal.

United States of America,—ss.

The President of the United States to Wm. R. Staats Company, a Corporation, and Title Insurance & Trust Company, a Corporation, Greeting:

You are hereby cited and admonished to appear in the United States Circuit Court of Appeals for the Ninth Circuit in the City and County of San Fran-

*Page-number appearing at foot of of page of original certified Record.

cisco, State of California, on the 23d day of August, 1915, pursuant to the appeal duly obtained and filed in the clerk's office of the District Court of the United States for Southern District of California, Southern Division, wherein you as defendants are appellees and Security Trust & Savings Bank, a corporation, trustee in bankruptcy of Fielding J. Stilson Company, a corporation, bankrupt, is the appellant, to show cause, if any there be, why the order and decree and each of them in said appeal mentioned, should not be reversed and corrected and why speedy justice should not [5] be done to the parties in that behalf, and to do and receive what may appertain to justice to be done in the premises.

WITNESS, the Honorable OSCAR A. TRIPPET, United States District Judge for the Southern District of California, on the 26th day of July, in the year of our Lord one thousand nine hundred and fifteen.

OSCAR A. TRIPPET,
District Judge. [6]

[Endorsed]: (Original.) No. 235. In the United States District Court, Southern District of California, Southern Division. Security Tr. & Sav. Bank, a Corporation, Trustee, Complainant, vs. Wm. A. Staats Company et al., Defendants. Citation on Appeal. Filed Jul. 26, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Clerk.

Receipt of copy of the within is hereby admitted this July 26, 1915.

O'MELVENY, STEVENS, MILLIKIN and
WALTER K. TULLER,

Attorney for Defts. [7]

In the District Court of the United States of America, in and for the Southern District of California, Southern Division.

No. 235—CIVIL, S. D.

SECURITY TRUST & SAVINGS BANK, a Corporation, Trustee in Bankruptcy of FIELDING J. STILSON COMPANY, a Corporation, Bankrupt,

Complainant,

vs.

WM. R. STAATS COMPANY, a Corporation, and
TITLE INSURANCE & TRUST COMPANY,
a Corporation,

Defendant. [8]

In the District Court of the United States in and for the Southern District of California, Southern Division.

SECURITY TRUST & SAVINGS BANK, a Corporation, Trustee in Bankruptcy of FIELDING J. STILSON COMPANY, a Corporation, Bankrupt,

Complainant,

vs.

WM. R. STAATS COMPANY, a Corporation, and
TITLE INSURANCE & TRUST COMPANY, a Corporation,

Defendants.

Bill of Complaint.

To the Honorable OLIN WELLBORN, Judge of the District Court of the United States in and for the Southern District of California, Southern Division:

Security Trust & Savings Bank, a corporation, trustee in bankruptcy of the estate of Fielding J. Stilson Company, a corporation, bankrupt, brings this, its bill of complaint, against Wm. R. Staats Company, a corporation, and Title Insurance & Trust Company, a corporation, both of the County of Los Angeles, State of California;

Your orator complains and says:

I.

That during all the times mentioned the complainant was and now is a corporation organized under the laws of the State of California and doing business in Los Angeles, California, and authorized by law and its charter (among other rights) to act as trustee in bankruptcy. [9]

II.

That during all the times mentioned the defendants, Wm. R. Staats Company and Title Insurance & Trust Company, were and each was and now is a corporation organized under the laws of the State of California.

III.

That on the second day of July, 1912, an Involuntary Petition in Bankruptcy was filed in the above court against Fielding J. Stilson Company, a corporation organized under the laws of the State of

California, and that thereafter such proceedings were had that on the 24th day of October, 1912, an Adjudication in Bankruptcy was duly made and entered adjudging said Fielding J. Stilson Company a bankrupt and thereafter such proceedings were had that on the 10th of December, 1912, the complainant was elected trustee in bankruptcy of the estate of said Fielding J. Stilson Company, a bankrupt. On the 11th day of December, 1912, said complainant duly qualified as such trustee by furnishing bond as required by the order of the Court, and ever since said last-named date the complainant has been and now is the duly elected, qualified and acting trustee in bankruptcy of Fielding J. Stilson Company, bankrupt.

IV.

On the 19th day of March, 1912, said defendant, Wm. R. Staats Company, was a general unsecured creditor of Fielding J. Stilson Company, in the sum of Three Thousand Eight Hundred and Seventy Dollars (\$3,870.00). That on said date Fielding J. Stilson Company was indebted to a large number of other general and unsecured creditors and was then and ever since has been insolvent, and did not have sufficient assets or property which, in the aggregate at a fair valuation, would enable it to pay and satisfy its debts. That on said date the said Wm. R. Staats [10] Company knew and had reasonable cause to believe that the said Fielding J. Stilson Company was so insolvent. That on said date Fielding J. Stilson Company made, executed and delivered unto the defendant, Title Insurance

& Trust Company, a corporation, a deed of trust, a copy of which is hereto attached and marked exhibit "A" and made a part of this complaint.

That said deed was executed and acknowledged so as to permit it to be recorded, and it was recorded in the office of the county recorder of Los Angeles County, California, on the 20th day of March, 1912, in Book 4924, Page 186 of Deeds, Los Angeles County Records. That said conveyance was made and received as security for the aforesaid indebtedness, to Wm. R. Staats Company. That the effect of said conveyance was and is to secure the said Wm. R. Staats Company, and to enable it to receive a greater percentage of its indebtedness than any other creditors of the same class, to wit, general unsecured creditors. That said transfer of said property was then and there made by said Fielding J. Stilson Company with intent to give said Wm. R. Staats Company a preference as a creditor of said Fielding J. Stilson Company in violation of the acts of Congress to establish a uniform system of bankruptcy in the United States.

V.

That on the 23d day of December, 1912, complainant herein demanded of said Wm. R. Staats Company and said Title Insurance & Trust Company a reconveyance of said property, but the said defendants each then and ever since have refused and failed to execute or deliver any reconveyance of any or all of said property, and that said transfer and conveyance is now in full force and effect.

All of which acts, doings and proceedings are con-

trary to [11] equity and good conscience and tend to the manifest wrong, injury and oppression of the complainant in the premises.

IN CONSIDERATION WHEREOF, and inasmuch as complainant is remediless according to the strict rule of common law, and can only have relief in a court of equity where matters of this nature are cognizable, said complainant now prays that said defendants be required according to their best and utmost knowledge, remembrance, information and belief, full, true and perfect answer make to this bill, and not under oath or affirmation, the benefit of which is hereby expressly waived; that this Court grant a decree that said deed, transfer and conveyance be vacated, set aside and declared void, and that neither of said defendants has any right, title, interest, estate, claim or lien in or to said real property described in said exhibit "A" or any part thereof, and for costs of suit, and for such other and further relief in the premises as the Court may require and as to the Court may seem meet and agreeable to equity.

[Seal] SECURITY TRUST & SAVINGS BANK.

W. A. ELLIS,

Assistant Secretary,

Trustee in Bankruptcy of the Estate of Fielding J.

Stilson Company, a Corporation, Bankrupt.

W. T. CRAIG and

CARROLL ALLEN,

Solicitors for Complainant. [12]

[Exhibit "A" to Bill of Complaint—Trust Deed
Dated March 19, 1912, from Fielding J. Stilson
to Title Insurance and Trust Company.]

COPY.

THIS DEED OF TRUST, Made this 19th day of March, 1912, Between Feilding J. Stilson Company, a corporation *a corporation* organized and existing under the laws of the State of California, having its principal place of business in Los Angeles, California, party of the first part, TITLE INSURANCE AND TRUST COMPANY, a corporation having its principal place of business at Los Angeles, California, party of the second part (hereinafter sometimes called the Trustee), and William R. Staats Company, a corporation, party of the third part:

WITNESSETH: That, Whereas, said party of the first part is indebted to said party of the third part in the sum of Three Thousand Eight Hundred and Seventy (\$3,870.00) Dollars, and has agreed to pay the same, with interest, according to the terms of one certain Promissory Note (certified by said Trustee to be the promissory Note mentioned as secured hereby) in words and figures as follows:

\$3,870.00

Los Angeles, California, March 19th, A. D. 1912.

One day after date, for value received Fielding J. Stilson Company, a corporation, promises to pay to William R. Staats Company, a corporation or order, at Los Angeles, California the sum of Three Thousand Eight Hundred and Seventy (\$3,870.00) Dol-

lars, with interest from date hereof until paid, at the rate of seven (7) per cent. per annum, payable monthly; should the interest not be so paid, it shall become a part of the principal and thereafter bear like interest as the principal. Should default be made in the payment of any installment of interest when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this Note. [13]

Principal and interest payable in gold coin of the United States of the present standard. This note is secured by a certain Deed of Trust to the Title Insurance and Trust Company, a corporation.

FIELDING J. STILSON COMPANY.

By FIELDING J. STILSON,

President.

[Corporate Seal] By CARROLL A. STILSON,

Secretary.

NOW, THEREFORE, in consideration of the indebtedness evidenced by said Note...., and for the purpose of securing the payment thereof with interest as therein provided, and also to secure the repayment of any sum of money with interest thereon that may otherwise be or become due or payable to either the parties of the second or third part under the provisions of this Instrument, and also to secure the repayment of such additional sums, not to exceed \$1,935.00, with interest thereon, as may be hereafter borrowed and received by said party of the first part from said party of the third part and evidenced by another Promissory Note or Notes executed and delivered therefor by said party of the first

part to the said party of the third part (said Note or Notes, when executed and delivered, to be certified by said Trustee as aforesaid), said party of the first part does by these presents GRANT, BARGAIN, SELL, CONVEY and CONFIRM unto said party of the second part that certain real property situate in the City of Los Angeles, County of Los Angeles, State of California, described as follows:

Lot Seventeen (17) Block Nine (9), Lots two (2), three (3), six (6) and seven (7) Block (11) Angeleno Heights Tract as per map recorded in Book 7, page 88 Miscellaneous Records of said County.

Lots Sixty-six (66), Sixty-seven (67), Sixty-eight (68) [14] and Sixty-nine (69) Block Fifteen and one-half ($15\frac{1}{2}$), Lot Forty-three (43) Block Sixteen (16), Lot Five (5) Block Twenty (20), Lots Three (3) and Twenty-seven (27) in Block Twenty-nine (29) Angeleno Heights Tract as per map recorded in Book 10, page 63 Miscellaneous Records of said County.

Lots One (1) and Sixteen (16) in Block Twenty-five (25) Angeleno Heights Tract, as per map recorded in Book 12, Page 25 Miscellaneous Records of said County.

TO HAVE AND TO HOLD the same upon the trusts hereinafter expressed, to wit:

FIRST: During the continuance of these trusts, party of the first part agrees to pay when due, all taxes, assessments and incumbrances which may be or appear to be liens upon said property, or any part thereof, including taxes levied or assessed upon the debt secured hereby; to keep the buildings in-

sured against loss by fire to the amount required by and in such insurance companies as may be satisfactory to party of the third part, loss, if any, payable to said party of the third part; and to keep said property in good condition and repair and to permit no waste thereof.

Should said property, or any part thereof require any inspection, repair, cultivation, irrigation, protection or insurance other than that provided by party of the first part, then the parties of the second and third parts (they being hereby made the sole judges as to the necessity therefor) may without notice to party of the first part, enter or cause entry to be made upon said property and may inspect, repair, cultivate, irrigate, protect or insure said property in such manner or amount as they may deem necessary.

Said parties of the second and third parts, or either of them, at their option, may purchase, compromise or pay all or any adverse claims, liens or incumbrances affecting the title [15] to said property or these trusts, or which, in their judgment, seem to affect the same, and may contest any taxes, assessments, adverse claims, liens or incumbrances, and may prosecute or defend any suit or proceeding instituted for the enforcement thereof, and may settle and compromise any claims which, in their judgment, affect or seem to affect the title to said property or these trusts, but they shall not be obligated to make any such payments or to perform any such service.

These trusts shall be and continue as security to

said parties of the second and third parts for the payment of the indebtedness evidenced by said Promissory Note; for the repayment of any additional sums, with interest thereon, borrowed by said party of the first part, as herein provided; for the repayment of any sums that may be expended or advanced by parties of the second and third parts under the terms hereof, together with interest thereon at the same rate borne by the Promissory Note hereinbefore set out; and for the costs, fees, charges and expenses of this trust and of any service rendered under the terms hereof.

Said party of the first part agrees to repay without demand all sums so advanced or expended by said parties of the second and third parts or either of them, and a failure to pay said sums on or before the next date thereafter when an interest payment upon said Promissory Note becomes due shall constitute a default for which all sums secured hereby shall become immediately due and payable at the option of the party of the third part, and for which the Trustee may proceed to sell as hereinafter provided.

SECOND: If said party of the first part shall pay, or cause to be paid, when due, the indebtedness aforesaid with the [16] interest thereon, together with all other sums secured or intended to be secured hereby, and shall deliver to said Trustee written notice from said party of the third part of the full payment thereof, and shall surrender the said Promissory Note to said Trustee for cancellation, and upon demand shall pay all other sums secured or in-

tended to be secured hereby, including the costs, fees, charges and expenses of this Trust and of the reconveyance of the property aforesaid, then said Trustee shall reconvey, without warranty, all the estate in the premises aforesaid to it by this instrument granted unto the said party of the first part, its successors and assigns, at its request and cost, or so much thereof as shall then be held by said Trustee.

THIRD: If default shall be made in the payment of any of said sums of principal or interest when due, as provided in said Promissory Note, or in the payment of any sums herein provided to be paid or repaid, or of any of the interest thereon, then said Trustee, on written demand by the party of the third part but without the necessity of making demand on the party of the first part for the payment of any of said sums, shall sell the above granted property, or such part thereof as it shall deem necessary to sell in order to accomplish the objects of these trusts.

Such sale shall be made in the following manner, namely:

Said Trustee shall publish notice of the time and place of such sale, with a description of the property to be sold, at least twice a week for six successive weeks, in some newspaper published in the City of Los Angeles, California, and may from time to time postpone such sale by publication of a notice of postponement, in the same newspaper at least once each week prior to the date of the sale fixed by said notice of postponement, or at its [17] option, by public announcement thereof at the time and place of sale

so advertised; but, in case of sale of property situate outside of Los Angeles County, the notice of sale shall also in like manner be published in a newspaper published in the County in which the property is situated; but if there be no newspaper published in any County as often as twice a week, then such notice shall be published for six successive weeks in every issue of such newspaper published in such County during such period; and on the day of sale so fixed said Trustee may sell the property so advertised or any portion thereof at public auction, either in said City of Los Angeles or, at its discretion, in any County in which any part of said property may be situated, to the highest bidder for cash in said gold coin.

Said Trustee may sell said property as a whole, or in such parcels or subdivisions as it may deem best, or part at one time and part at another time, and after any such sale and after due payment made, shall execute and deliver to the purchaser or purchasers a Deed or Deeds of Grant conveying the property so sold to such purchaser or purchasers, but without covenant or warranty of any kind, express or implied, regarding the title or incumbrances;

And out of the proceeds of such sale or sales shall pay:

First: The expenses of such sale, together with the costs, fees, charges and expenses of this trust, including the compensation of the party of the second part as Trustee hereunder in the sum of Two Hundred and Thirty-five (\$235.00) Dollars in said gold

coin of the United States, which said amounts shall become due and payable upon any written demand made by the said party of the third part for the sale of the property mentioned in this instrument.

Second: All sums which may have been paid or advanced in [18] accordance with the provisions hereof and not repaid, together with the interest accrued thereon.

Third: The amount due and unpaid on said Promissory Note herein set out, with interest accrued thereon.

Fourth: Any additional sums, with interest accrued thereon, borrowed by said party of the first part from said party of the third part, evidenced by another Promissory Note or Notes, as hereinbefore provided.

And Lastly: The balance or the surplus of such proceeds, if any, to the order of said party of the first part, its successors or assigns.

In the event of a sale of said property or any part thereof, and the execution of a Deed or Deeds therefor under these trusts, then the recitals therein of default, publication of notice of sale, demand that such sale should be made, postponement of sale, terms of sale, sale, purchaser, payment of purchase money, and any other fact affecting the regularity or validity of such sale shall be conclusive proof of such facts; and any such Deed or Deeds shall be conclusive against all persons as to such facts recited therein; and the acknowledgment of the receipt of the purchase money contained in any Deed executed to a purchaser, as aforesaid, shall be a sufficient dis-

charge to such purchaser from all obligation to see to the proper application of the purchase money as herein provided.

The Trustee may, at any time without notice, upon written request of the party of the third part, reconvey portions of the property conveyed hereby less than the whole without affecting the personal liability of any person for the payment of the indebtedness mentioned as secured hereby or the effect of this Deed of Trust upon the remainder of said property and without liability of the Trustee for Reconveyance so made. [19]

This Deed of Trust secures the payment of all the indebtedness and the performance of all of the obligations hereinbefore referred to, and in all its parts applies to, inures to the benefit of, and binds the heirs, administrators, executors, successors and assigns of all and each of the parties hereto.

This Deed of Trust shall not be effective unless, PRIOR TO ITS RECORDATION, the trust is accepted by said Trustee, under its corporate name and seal, by a duly authorized official thereof.

IN WITNESS WHEREOF, the party of the first part has hereunto caused its corporate name and seal to be affixed by its, President, and, Secretary, thereunto duly authorized by a resolution passed by its Board of Directors at a legal meet-

ing thereof duly convened and held on the 19th day of March, 1912.

FIELDING J. STILSON COMPANY.

By FIELDING J. STILSON,
President.

By CARROLL A. STILSON,
Secretary.

The foregoing trust is hereby accepted.

TITLE INSURANCE AND TRUST
COMPANY.

By THEO. A. SIMPSON,
Assistant Trust Officer.

State of California,
County of Los Angeles,—ss.

On this 19th day of March, 1912, before me, J. E. Coggeshall, a notary public in and for said county, personally appeared Fielding J. Stilson, known to me to be the president, and Carroll A. Stilson, known to me to be the secretary of Fielding J. Stilson Company, the corporation that executed the within and foregoing instrument, and known to me to be the persons who executed the within instrument on behalf of the corporation therein named and [20] acknowledged to me that such corporation executed the same.

WITNESS MY HAND and official seal the day and year in this certificate first above written.

J. E. COGGESHALL,
Notary Public in and for the County of Los Angeles,
State of California.

The trustee's charges and expenses in an ordinary sale of property in Los Angeles County will be based

upon the following schedule, and the proper amount should be inserted in the blank provided for that purpose.

For any sum not exceeding	\$ 500.00...	\$ 75.00
Over \$ 500.00 and not exceeding	1,000.00...	100.00
Over 1,000.00 and not exceeding	2,000.00...	150.00
Over 2,000.00 and not exceeding	3,500.00...	200.00
Over 3,500.00 and not exceeding	5,000.00...	235.00
Over 5,000.00 and not exceeding	7,500.00...	285.00
Over 7,500.00 and not exceeding	10,000.00...	320.00
Over 10,000.00 and not exceeding	15,000.00...	350.00
\$25.00 for each \$5,000.00 or fraction thereof over \$15,000.00.		

In all cases the note must be surrendered to the trustee for cancellation when reconveyance is requested, accompanied by the written request of the owner of the note for such reconveyance.

A charge of \$1.50 will be made for a reconveyance hereunder.

[Endorsed]: Register No. 12,629. Trust Deed. Corporation. Fielding J. Stilson Company to Title Insurance and Trust Company, as Trustee for William R. Staats Company. Dated March 19, 1912. Title Insurance and Trust Company, Cor. Franklin and New High Sts., Los Angeles, Cal. Order No. ——. Notice to County Recorders. Under no circumstances must this Trust Deed be mailed or delivered to any person other than the Title Insurance and Trust Company, Cor. Franklin and New High Sts., Los Angeles, Cal. Recorded at request of Grantee March 20, 1912, at 9 A. M. In Book 4924, page 186, of Deeds Los Angeles County Records. C.

L. Logan; County Recorder. By G. W. Taylor.
[21]

United States of America,
Southern District of California,
Southern Division,
County of Los Angeles,—ss.

W. A. Ellis, being duly sworn, says: That he is the assistant secretary of the Security Trust & Savings Bank, a corporation, trustee in bankruptcy of Fielding J. Stilson Company, a corporation, bankrupt, in the foregoing-entitled matter; that he has heard read the foregoing Bill of Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief and as to those matters, that he believes it to be true.

[Seal]

W. A. ELLIS.

Subscribed and sworn to before me this 20th day of January, 1913.

[Notarial Seal]

F. L. WARNER,

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: No. 235—Civil. In United States District Court, Southern District of California, Southern Division. Security Trust & Savings Bank, Trustee in Bankruptcy of Fielding J. Stilson Co., a Corporation, Bankrupt, Complainant, vs. Wm. R. Staats Co. & Title Insurance & Trust Co., Defendants. Bill of Complaint. W. T. Craig and Carroll Allen, Board of Trade Rooms, Equitable Savings Bank Building, Telephones Home 10112, Sunset Main 4622, Los Angeles, Cal., Solicitors for Com-

plainant. Filed Jan. 22, 1913. Wm. M. Van Dyke,
Clerk. By Chas. N. Williams, Deputy Clerk. [22]

[**Subpoena ad Respondendum.**]

UNITED STATES OF AMERICA.

*District Court of the United States, Southern District
of California, Southern Division.*

IN EQUITY.

The President of the United States of America,
Greeting: To the Wm. R. Staats Company, a
Corporation, and the Title Insurance & Trust
Company, a Corporation:

YOU ARE HEREBY COMMANDED, That you
be and appear in said District Court of the United
States aforesaid, at the courtroom in Los Angeles,
California, on the 3d day of March, A. D. 1913, to
answer a Bill of Complaint exhibited against you
in said court by the Security Trust & Savings Bank,
a corporation, trustee in bankruptcy, of the estate
of Fielding J. Stilson Company, a corporation, bank-
rupt, said complainant being a corporation organized
under the laws of California, and doing business in
Los Angeles, California, and authorized by law and
its charter to act as trustee in bankruptcy and to
do and receive what the said Court shall have consid-
ered in that behalf. And this you are not to omit,
under the penalty of FIVE THOUSAND DOL-
LARS.

WITNESS, the Honorable OLIN WELLBORN,
Judge of the District Court of the United States, this
22d day of January, in the year of our Lord one thou-

sand nine hundred and thirteen and of our Independence the one hundred and thirty-seventh.

WM. M. VAN DYKE,
Clerk.

By Chas. N. Williams,
Deputy Clerk. [23]

MEMORANDUM PURSUANT TO RULE 12,
SUPREME COURT U. S.

You are hereby required to enter your appearance in the above suit, on or before the first Monday of March next, at the clerk's office of said court pursuant to said Bill; otherwise the said Bill will be taken *pro confesso*.

WM. M. VAN DYKE,
Clerk.

By Chas. N. Williams,
Deputy Clerk.

Clerk's office: Los Angeles, California.

[Endorsed]: (Original.) No. 235—Civil. U. S. District Court, Southern District of California, Southern Division. In Equity. Security Trust & Savings Bank, Trustee, etc., vs. Wm. R. Staats Co. et al. Subpoena.

(In pencil.) Craig & Allen. Voluntary appearance entered and subp. not served. [24]

*In the District Court of the United States in and for
the Southern District of California, Southern
Division.*

No. 235.

SECURITY TRUST & SAVINGS BANK, a Corporation, Trustee in Bankruptcy of FIELD-
ING J. STILSON COMPANY, a Corporation,
Bankrupt,

Complainant,

vs.

WM. R. STAATS COMPANY, a Corporation, and
TITLE INSURANCE & TRUST COMPANY, a Corporation,

Defendants.

Answer to Bill of Complaint.

To the Honorable OLIN WELLBORN, Judge of the
District Court of the United States in and for
the Southern District of California, Southern
Division.

Come now Wm. R. Staats Company and Title Insurance & Trust Company, defendants above named,
and answers the bill of complaint herein, as follows:

I.

Admit all the matters and things alleged in paragraph numbered I in said bill of complaint.

II.

Admit all the matters and things alleged in paragraph numbered II in said bill of complaint.

III.

Admit all the matters and things alleged in para-

graph numbered III in said bill of complaint.

IV.

Defendants admit that on the 19th day of March, 1912, [25] defendant Wm. R. Staats Company was a creditor of said Fielding J. Stilson Company in and for the sum of three thousand eight hundred seventy dollars (\$3,870.00); but deny that at said time or at any time said Wm. R. Staats Company was a general unsecured creditor in such sum, or in any sum, or a general creditor, or an unsecured creditor, in such sum, or in any sum. These defendants aver that the mode or manner in which said indebtedness was incurred and that the relation of said Wm. R. Staats Company to said Fielding J. Stilson Company were as hereinafter more particularly set forth.

These defendants deny upon their information and belief that on said date said Fielding J. Stilson was insolvent, or that it has ever since been or at any time since has been insolvent; and deny that at said time, or at any time since said date said Fielding J. Stilson Company did not have sufficient property which would enable it to pay and satisfy its debts. These defendants deny that on said date, or at any time said William R. Staats Company knew or had reasonable cause to believe that said Fielding J. Stilson *J. Stilson* Company was so, or at all, insolvent. These defendants admit that on said 19th day of March, 1912, said Fielding J. Stilson Company made, executed and delivered to the defendant Title Insurance & Trust Company its deed of trust as alleged in said bill of complaint, and admit that the same was executed and acknowledged so as to permit it to be

recorded, and that it was recorded as in said bill of complaint alleged. That these defendants aver that the reason said deed of trust was made, executed and delivered by said Wm. R. Staats Company was as hereinafter more fully set forth, and not otherwise. Said defendants deny that the effect of said conveyance was and is, or was, or is, to secure to the said Wm. R. Staats Company, or to enable it to receive a greater [26] percentage of its indebtedness than any other general unsecured creditor of Fielding J. Stilson Company, or any other creditor of the same class as said Wm. R. Staats Company.

These defendants deny upon their information and belief that said transfer of said property was then and there, or at all, made by said Fielding J. Stilson Company with intent to give said Wm. R. Staats Company a preference as a creditor of said Fielding J. Stilson Company, and deny that the same was in violation of the acts of Congress to establish a uniform system of bankruptcy in the United States, or in violation of any law. Deny that the same or any of the acts, doings or proceedings alleged in said bill of complaint were or are contrary to equity or good conscience, or tend to the manifest wrong, or any wrong, injury or oppression of complainant in the premises, or at all.

V.

These defendants aver that the facts and circumstances leading up to and causing the execution of said deed of trust are as follows: That, on the 19th day of March, 1912, and for many months prior thereto, both said Fielding J. Stilson Company and

said defendant Wm. R. Staats Company were conducting a general brokerage business in stocks and bonds in the city of Los Angeles, county of Los Angeles, State of California; that on the 15th day of March, 1912, said Fielding J. Stilson Company requested defendant Wm. R. Staats Company to sell to it for cash certain shares of stock in the Amalgamated Oil Company, a corporation, at the rate of sixty-four and 50/100 dollars (\$64.50) per share. That pursuant to said request defendant Wm. R. Staats Company then and there sold to said Fielding J. Stilson Company sixty shares of the stock of said Amalgamated Oil Company, at sixty-four and fifty hundredths dollars (\$64.50) per share, and delivered certificates of stock representing said shares to said Fielding J. Stilson Company, it being the understanding and [27] agreement of said Fielding J. Stilson Company and said defendant Wm. R. Staats Company, that said sale was made for cash. That said Fielding J. Stilson Company then and there delivered to said Wm. R. Staats Company its check on the Citizens National Bank (which was then and there a corporation regularly doing a banking business in the City of Los Angeles) in payment for said stock. That in due course of business said Wm. R. Staats Company presented said check for payment, and it was then and there notified, and it was the fact, that said Fielding J. Stilson Company did not have sufficient funds in said bank at said time of presentation, and had not had either at the time said check was drawn or at any time thereafter sufficient funds in said bank to meet said check, and on that

ground said bank refused to pay said check.

That all of said transactions took place in the City of Los Angeles, County of Los Angeles, State of California, and that under the laws of said State of California the facts as hereinbefore set forth entitled said Wm. R. Staats Company to rescind said contract and sale and to demand and receive back from said Fielding J. Stilson Company said shares of stock hereinbefore referred to. That thereupon said Wm. R. Staats Company reported the fact of its presentation of said check and refusal of payment to said Fielding J. Stilson Company, and the said Fielding J. Stilson Company, through its proper officers, thereupon represented to and assured said Wm. R. Staats Company that it, the said Fielding J. Stilson Company, was perfectly solvent, but that certain funds which it had expected to receive had been slightly delayed in receipt, and that for that reason it had not had sufficient funds on deposit to pay said check, and said Fielding J. Stilson Company then and there agreed that if said Wm. R. [28] Staats Company would not exercise its right to rescind said sale it, the said Fielding J. Stilson Company, would execute to said Wm. R. Staats Company, its note for said sum of three thousand eight hundred Seventy dollars (\$3,870), and to secure the same would execute a deed of trust on the property described in the copy of the deed of trust annexed to the bill of complaint herein. That in pursuance of said agreement, said Wm. R. Staats Company did refrain from exercising its said right to rescind such sale, and received and accepted from said Fielding J. Stil-

son Company its note for three thousand eight hundred seventy dollars (\$3,870.00), and the deed of trust a copy of which is annexed to the bill of complaint herein.

That in all of said transactions and dealings the said Wm. R. Staats Company acted in entire good faith, without any knowledge or information that said Fielding J. Stilson Company was insolvent, or any reasonable cause so to believe. These defendants aver that said note and deed of trust were given and received by said Wm. R. Staats Company for a present fair consideration passing from said Wm. R. Staats Company to said Fielding J. Stilson Company, as hereinbefore more fully set forth.

WHEREFORE, these defendants pray a decree that complainant take nothing by this action, that defendants have judgment against complainant for their costs herein incurred, and the defendants also pray for all further relief that may be meet and proper in the premises.

O'MELVENY, STEVENS & MILLIKIN,
WALTER K. TULLER,

Solicitors for said Defendants. [29]

United States of America,
Southern District of California,
Southern Division,
County of Los Angeles,—ss.

John Earle Jardine, being duly sworn, deposes and says: That he is an officer, to wit; the vice-president, of Wm. R. Staats Company, a corporation, one of the defendants in this action, and that he verifies this answer on behalf of both defendants herein; that

he has read the foregoing answer and knows the contents thereof, and that all the facts, matters and things stated in the foregoing answer are true of his own knowledge, except as to those therein stated on his information or belief, and that as to such matters he believes the same to be true.

JOHN EARLE JARDINE.

Subscribed and sworn to before me this 17th day of February, 1913.

[Seal] F. P. HARRINGTON,
Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: No. 235. In the District Court of the United States, in and for the Southern District of California, Southern Division. Security Trust & Savings Bank, Trustee, etc., vs. Wm. R. Staats Company et al. Answer to Bill of Complaint. Service accepted Feby. 18, 1913. W. T. Craig, Atty. for Compl't. O'Melveny, Stevens & Millikin, Attorneys at Law, 419-437 Wilcox Building, 206 S. Spring St., Los Angeles, Cal. Filed Feb. 18, 1913. Wm. M. Van Dyke, Clerk. By Chas N. Williams, Deputy Clerk. [30]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 235.

SECURITY TRUST & SAVINGS BANK, a Cor-
poration, Trustee,

Complainant,

vs.

WM. R. STAATS COMPANY, a Corporation, et al.,
Defendants.

Notice of Motion to Refer to Special Master.

To the Defendants Herein and to Their Attorneys,
Messrs. O'Melveny, Stevens & Millikin:

YOU WILL PLEASE TAKE NOTICE that on
Monday, the 26th day of January, 1914, at 10:30
o'clock A. M., the complainant herein will move the
said Court at the courtroom of said court in the
Federal Building in the City of Los Angeles, County
of Los Angeles, State of California, to refer the is-
sues in the said action to a Special Master to take
the testimony therein and report the same with his
findings to the Judge of said court.

Said motion will be made upon the ground that the
said action is at issue and that exceptional condi-
tions require that the same be referred to a Special
Master.

Complainant will use upon the said motion the
papers and pleadings on file in said action, the affi-
davit attached hereto and marked exhibit "A" and
made a part hereof and this notice.

Dated January 20, 1914.

W. T. CRAIG and
CARROLL ALLEN,
Attorneys for Complainant. [31]

EXHIBIT "A."

*In the District Court of the United States, for the
Southern District of California, Southern Division.*

No. 235.

SECURITY TRUST & SAVINGS BANK, a Corporation, Trustee,

Complainant,

vs.

WM. R. STAATS COMPANY, a Corporation, et al.,
Defendants.

State of California,

County of Los Angeles,—ss.

W. T. Craig, being duly sworn, deposes and says: That he is one of the attorneys for the complainant in the above-entitled action; that said action is at issue and ready for trial; that the same is an action in equity to set aside a preference obtained from Fielding J. Stilson Company, a bankrupt; that the said action has been pending since January 22, 1913; that the estate of the said Fielding J. Stilson Company cannot be closed until the final determination of said action; that the state of the calendar in said court is such that it is uncertain when the said action can be tried or whether the same can be tried during the year 1914 at all; that

it is necessary that the said matter be referred to a Special Master for the foregoing reasons.

W. T. CRAIG.

Subscribed and sworn to before me this 19th day of January, 1914.

[Seal] OLIVE DIFFENDERFER,
Notary Public in and for the County of Los Angeles,
State of California. [32]

[Endorsed]: No. 235—Civil. In United States District Court, Southern District of California, Southern Division. Security Trust & Savings Bank, a Corporation, Trustee, Complainant, vs. Wm. R. Staats Company, a Corporation, et al., Defendants. Notice of Motion to Refer to Special Master. Received Copy of the Within Notice this 20th day of Jan. 1914. O'Melveny, Stevens & Millikin, Attorneys for Defts. William T. Craig and Carroll Allen, Equitable Savings Bank Building, Los Angeles, Cal., Attorneys for Complainant. Filed Jan. 20, 1914. Wm. M. Van Dyke, Clerk. By Chas N. Williams, Deputy Clerk. [33]

At a stated term, to wit, the January term, A. D., 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the City of Los Angeles, on Thursday, the fifth day of March, in the year of our Lord, one thousand nine hundred and fourteen. Present: The Honorable FRANK H. RUDKIN, District Judge.

No. 235—CIVIL, S. D.

SECURITY TRUST & SAVINGS BANK, Trustee,
etc.,

Complainant,

vs.

WM. R. STAATS COMPANY et al.,

Defendants.

This cause coming on at this time to be heard on complainant's motion to refer said cause to a Special Master to be appointed therein; William T. Craig, Esq., appearing as counsel for complainant; Frank T. Rabe, Esq., appearing as counsel for defendants; and said motion having been argued, in support, thereof, by William T. Craig, Esq., of counsel for complainant, and in opposition thereto by Frank L. Rabe, Esq., of counsel for defendants; and said cause having been submitted to the Court for its consideration and decision on said motion and the oral argument thereof; it is now by the Court ordered that Lynn Helm, Esq., be and he hereby is appointed Special Master herein, to hear the issues raised by the bill of complaint and the answer of defendants, and report the same to this court, together with his findings of fact and conclusions of law thereon. [34]

[Report of Special Master.]

*In the District Court of the United States, for the
Southern District of California, Southern Division.*

No. 235—CIVIL.

SECURITY TRUST & SAVINGS BANK, a Corporation, Trustee in Bankruptcy of FIELDING J. STILSON COMPANY, a Corporation, Bankrupt,

Complainant,

vs.

WM. R. STAATS COMPANY, a Corporation, and
TITLE INSURANCE & TRUST COMPANY, a Corporation,

Defendants.

To the Honorable Judges of the District Court of the
United States, for the Southern District of California:

I, Lynn Helm, Referee in Bankruptcy, by an order entered herein on the 5th day of March, 1914, to hear the issues raised by the bill of complaint and the answer of the defendants, and to report the same to this Court, together with my findings of fact and conclusions of law thereon, respectfully report that on the 23d, 27th and 28th days of April, 1915, I was attended by the Security Trust & Savings Bank, trustee in bankruptcy of Fielding J. Stilson Company, a Corporation, complainant, by W. T. Craig, Esq., and Carroll Allen, Esq., its attorneys, and by William R. Staats Company and the Title Insurance

& Trust Company, defendants, by their attorneys Messrs. O'Melveny, Stevens & Millikin, and Walter K. Tuller, Esq., and having heard the testimony produced on said hearing on behalf of the complainant and the defendants, the reporter's transcript of which is filed herein, no other testimony having been offered on said hearing, and having heard the argument of counsel and being fully advised in the premises, do find and report as follows: [35]

1. Fielding J. Stilson Company, a corporation organized under the laws of the State of California, was on the 24th day of October, 1912, adjudged a bankrupt, upon an involuntary petition filed in this court against said Fielding J. Stilson Company on the 2d day of July, 1912. It was alleged in said involuntary petition of the creditors of said Fielding J. Stilson Company that at the time of the filing of the petition in bankruptcy said Fielding J. Stilson Company was insolvent and that within four months next immediately preceding the date of the filing of the petition in bankruptcy the said Fielding J. Stilson Company committed an act of bankruptcy in that it did on or about the 14th day of March, 1912, while it was insolvent, convey and transfer certain of its property, to wit, lot 17 of block 9 of Angeleno Heights, in the City and County of Los Angeles, State of California, to said William R. Staats Company, with intent then and there to hinder and delay the creditors of said Fielding J. Stilson Company; and also that within four months next immediately preceding the filing of the petition in bankruptcy the said Fielding J. Stilson Company

committed an act of bankruptcy in that on or about the 14th day of March, 1912, while it was insolvent, it conveyed and transferred certain property, to wit, lot 17 in block 9 of Angeleno Heights aforesaid, to said Williams R. Staats Company, who was then and there a creditor of said Fielding J. Stilson Company, with intent then and there to prefer the said William R. Staats Company over the other creditors of said bankrupt and that the effect of said conveyance then and there was to secure the said Wm. R. Staats Company and to enable it to receive a greater percentage of its indebtedness than any other creditors of said bankrupt of the same class.

Upon the filing of the petition in involuntary bankruptcy [36] aforesaid the service of a writ of subpoena was made upon the Fielding J. Stilson Company, returnable as required by law and within five days after the return day of said subpoena and to wit, on the 27th day of July, 1912, the said bankrupt appeared and filed a demurrer and answer to said petition, but within said five days after said return day no petition or answer was filed by the William R. Staats as a creditor of said bankrupt, or by any other creditors of said bankrupt. Thereafter said petition and the issue made by the answer of said bankrupt was referred to the undersigned as Special Master, and on the 9th day of October, 1912, a Special Master's Report was filed herein, wherein among other things it was found that on the 15th of March, 1912, said bankrupt Fielding J. Stilson Company was indebted in upwards of the sum of \$250,000 and nearly \$260,000 in liabilities, and that

said Fielding J. Stilson Company at that time had assets consisting of stocks, bonds, bills receivable and accounts receivable, and real estate, which did not aggregate in value more than the sum of \$215,-911.23; and that the said Fielding J. Stilson Company committed an act of bankruptcy in that it did on the 19th day of March, 1912, when insolvent, convey and transfer certain of its property, to wit, lot 17 in block 9 of Angeleno Heights aforesaid, to said William R. Staats Company, being then a creditor of said Fielding J. Stilson Company, and said conveyance being made with intent then and there to prefer said William R. Staats Company over its other creditors, including said petitioners, the effect of said transfer being then and there to enable the said William R. Staats Company to receive payment of a greater percentage of its debt than any other unsecured creditor of said bankrupt.

Upon the coming in of this Master's report the said report was confirmed and *the* on the 24th of October, 1912, said [37] bankrupt was duly adjudged a bankrupt as aforesaid. The schedules in bankruptcy were filed herein by said bankrupt on the 27th day of November, 1912.

It appears from the evidence herein that the alleged transfer by the said bankrupt of its property to the Title Insurance & Trust Company, for the benefit of said William R. Staats Company, was made on the 19th day of March, 1912, conveying said lot 17, block 9, and other lots in Angeleno Heights therein described, and that subsequent to, that date the said bankrupt transacted no business,

incurred no further liabilities and acquired no assets, and that its condition was the same between the 19th day of March, 1912, and the date of the filing of the schedules herein on the 27th day of November, 1912.

The liabilities of said bankrupt on the 19th day of March, 1912, were between \$250,000 and \$260,000; in fact they are shown by the schedules to be \$257,-760.87. The assets of said corporation, consisting of stocks, bonds, bills receivable and accounts receivable, as scheduled, taken at a fair valuation, did not exceed in value on the 19th of March, 1912, the sum of \$247,977.79. In fact from the testimony now presented to me, I find said assets were of the value of \$202,302.79. I therefore find that the said bankrupt was on the 19th of March, 1912, at the time of the giving of the alleged preference, insolvent.

2. I am further impelled to this conclusion because I am of the opinion that the creditors of said bankrupt, which includes the William R. Staats Company, the defendant herein, were parties to the proceeding to have said bankrupt so adjudged, and are precluded by the order of adjudication in so far at least as the adjudication determines the insolvency of the debtor, and that it committed an act of bankruptcy within four months of the filing of the petition in bankruptcy. In the proceeding to have Fielding J. Stilson Company adjudged a bankrupt two of the essentials [38] to be determined were the insolvency of the debtor and the fact that it had within four months of the filing of the petition, to wit, on the 19th of March, 1912, committed an act of bankruptcy, in that it did make a transfer of its

property to William R. Staats Company with intent on its part to create a preference, the effect of which transfer was to give said William R. Staats Company a greater percentage of its claim than other creditors of the same class.

In *Cook v. Robinson*, 28 A. B. R. 182, 187, 194 Fed. 753, the Court said:

“Now, the creditors of the bankrupt became parties to the proceeding to have him so adjudged and are precluded by the order of adjudication in so far at least as the adjudication determines the insolvency of the debtor, and that he has committed an act of bankruptcy within four months of the filing of the petition. In *Bear v. Chase*, 3 Am. B. R. 746, 99 Fed. 920, 924, 40 C. C. A. 182, 186, a case bearing near analogy upon the facts to the case at bar, the Circuit Court of Appeals for the Fourth Circuit expressly held that:

‘Upon the adjudication of the bankrupt, all creditors became parties to the bankruptcy proceedings by operation of law, and particularly these creditors by whose acts the bankruptcy was caused.’

Here, as there, the person running the attachment is a creditor of the bankrupt, and it was he who through the attachment precipitated the proceeding in bankruptcy. So in *Hackney v. Hargreaves Bros.*, 13 Am. B. R. 164, 170, 68 Neb. 624, 99 N. W. 675, which was a contest between a trustee in bankruptcy and one sought to be charged as a creditor having received unlawful

preference, the Court gave a like rendering of the law, as follows: [39]

‘The defendants in the action are not third parties in the sense that they are in no wise connected with the bankruptcy proceedings, because, for the purpose of these controversies, and in determining their liability, they are sought to be charged as creditors of the bankrupt having received unlawful preferences, and for such purposes were necessarily parties to the bankruptcy proceedings.’

Being parties to the bankruptcy proceeding, it must follow that the creditors are precluded by the adjudication upon such issues as must necessarily be determined in order to pass judgment; otherwise there would be no end to controversy as to these matters, as every creditor would claim the right to be heard by independent suit. As was said in *Re American Brewing Co.* (C. C. A., 7th Cir.), 7 Am. B. R. 463, 470, 112 Fed. 752–758, 50 C. C. A. 517, 523:

‘If it were necessary, in order to bind creditors by a judgment in bankruptcy, that they should appear and answer, as they always have a right to do, then an adjudication could be prevented simply by creditors abstaining from appearing in the proceedings. But it is well settled that the proceedings are in a large sense *in rem*, and are binding whether the bankrupt or creditors appear or not.’

And it has been held that the adjudication in bankruptcy, until avoided by direct proceeding,

is as binding and conclusive upon the bankrupt and the creditors as much so as a judgment *inter partes* on due hearing in a court of competent jurisdiction. 164 Fed. 823-825, 90 C. C. A. 627. See, also, *In re First National Bank* (C. C. A., 8th Cir.), 18 Am. B. R. 265, 152 Fed. 64-70, 81 C. C. A. 260."

To the same effect is *Lazarus vs. Eagan*, 30 A. B. R., 287, 206 Fed. 518. The Court said: [40]

"The decree of this court put in evidence adjudicating on the 28th of December, 1911, W. J. Greggs, a bankrupt, conclusively established the fact at issue, as alleged in the petition, that Greggs was insolvent when he transferred his property to his wife and afterwards to Eagan. Any other holding would lead to endless confusion in the administration of the law, and would in many cases, nullify one of the principal purposes of the Bankruptcy Act, as was said in *DeGroff v. Sang*, 92 App. Div. (N. Y.) 564; s. c., 87 N. Y. 78. And it matters not that Eagan was actually without notice of these proceedings. An adjudication being an adjudication *in rem*, all persons interested in the *res* are regarded as parties to the bankruptcy proceedings. Among such parties are not only the trustees but all creditors, including lienors, *Chapman v. Brewer*, 114 U. S. 169; *Carter v. Hobbs* (D. C., Ind.) 1 Am. B. R. 215, 92 Fed. 594; *In re Ulfelder Clothing Co.* (D. C., Cal.), 3 Am. B. R. 425, 98 Fed. 409."

There is nothing contrary to this view in the case of Shepherd-Strassheim Co. vs. Black, 33 A. B. R., 574. Even in that case it is recognized that the decree of adjudication might be conclusive upon the separate question of insolvency even if it was not conclusive upon the question of whether the defendant had a right to retain the security which he received which was alleged to be a preference, as that was not presented by the petition for adjudication in bankruptcy, nor adjudicated therein. To the same effect is Hussey vs. Richardson-Roberts Dry Goods Co., 17 A. B. R., 511.

The decision in Cook vs. Robinson, *supra*, is controlling upon this court in this matter and it must be held that the question of insolvency of this bankrupt At the date of the giving of this preference is *res adjudicata*. I therefore find that said bankrupt was insolvent on March 19, 1912, at the date of the giving of the security in question to the defendant. [41]

3. It is contended on behalf of the defendant that in this transaction there was no diminution of the bankrupt's assets by reason of the security given to the defendant and that therefore the effect of the transfer by the bankrupt to the Title Insurance & Trust Co. for the benefit of William R. Staats Company did not enable said William R. Staats Company to obtain a greater percentage of its debt than any other creditors of the same class; and it is further contended that the entire transaction between William R. Staats Company and the bankrupt should be regarded as one transaction and that the making of the transfer was not for the purpose of securing

an antecedent debt of the bankrupt to said defendant but was given for a present fair consideration.

The bankrupt and the defendant William R. Staats Company were brokers, dealing in stocks, bonds and other securities and each of them were represented upon the Los Angeles Stock Exchange. On the 15th of March, 1912, the bankrupt in due course of business purchased of the defendant William R. Staats Company 200 shares of Amalgamated Oil Company at \$64.50 per share. The defendant William R. Staats Company delivered certificates representing 60 shares and gave a due bill for 140 shares for subsequent delivery. The sale was a cash transaction and the bankrupt gave its check to William R. Staats Company on that date, payable at the Citizens National Bank of Los Angeles, for \$12,900, the cash value of the stock purchased. This check, on presentation to the Citizens' National Bank was dishonored and rejected for want of funds. Immediately on the rejection of the check on the 16th of March, John A. Jardine, an officer of the William R. Staats Company, telephoned Fielding J. Stilson, the President of the bankrupt corporation, in reference to this check and its rejection and was advised by him that the check would be made good and for him to put it through the bank again the following [42] banking day. It was put through on the following Monday, the 18th of March, but was again rejected for want of funds. Again Stilson asked Jardine to put the check through the bank a third time and it was again rejected for want of funds. Stilson then told Jardine that he was making disposition of some

property and expected a payment of \$10,000, and that he would protect William R. Staats Company. On the following day, the 19th, Stilson advised Mr. Jardine that he could not meet the payment, that the deal from which he expected funds was not consummated but that the Fielding J. Stilson Company had some real estate and would give them security thereon. Thereupon one of the defendant's employees went with Mr. Stilson to examine the property offered as security, which Stilson estimated was on the value of \$25,000, and it was accepted and a trust deed was given that afternoon to the Title Insurance & Trust Company, for the benefit of William R. Staats Company, to secure it in the sum of \$3,870, the value of the 60 shares of stock of the Amalgamated Oil Company, sold and delivered to the bankrupt as aforesaid, and was placed of record on the following morning, March 20, 1912, at 9 o'clock A. M. That morning the bankrupt suspended and has transacted no business since that day.

It is contended on behalf of the defendant William R. Staats Company, that the transaction between it and the bankrupt was a cash transaction; that upon the failure of the bankrupt to pay its check, which was given for the stock received, that the defendant William R. Staats Company had a right of rescission and that the waiver of this right of rescission was a present consideration for the taking of the transfer from the defendant, and that the transfer was in fact only security for a then present loan.

These contentions of the defendant cannot be upheld for it cannot be said that this transfer was not

a diminution of the [43] bankrupt's estate, nor that the transaction should be regarded as instantaneous and one. The right of rescission on the part of the defendant William R. Staats Company, with the right to the return to it of the certificates for the 60 shares of stock which it had on the 15th of March, 1912, delivered to the bankrupt, is predicated upon either that the seller retains the stock sold, or the ability on the part of the bankrupt to return the 60 shares of stock, otherwise William R. Staats Company would only have a general claim against the Fielding J. Stilson Company for the value of the stock and it would in effect to that extent be a general creditor of the bankrupt.

Otherwise also, the right of rescission would not be an asset in the hands of William R. Staats Company but would result in a lawsuit which might inevitably be a liability.

There is no testimony in this case that at any time after the 15th of March, 1912, Fielding J. Stilson Company had undisposed of 60 shares of stock which it received from William R. Staats Company on that date, but on the contrary there is positive testimony that the due bill for 140 shares of stock and the other 60 shares, immediately on its receipt had been hypothecated by the Fielding J. Stilson Company, so that if William R. Staats Company had attempted to rescind it would not have been in any position to have reacquired the stock which it sold and delivered to the bankrupt.

William R. Staats Company consented to give the Fielding J. Stilson Company time to obtain the

money from other sources and retained no lien upon the stock which it had sold it. Its consent in this respect, even if not intended to have that effect, broke the continuity of the transaction and made the stock or its proceeds part of the general assets of the bankrupt's estate. [44]

This is not like the case of *Grey vs. Dockendorff*, 231 U. S., 513, wherein it appeared that the bankrupt, which was engaged as a cotton converter, in order to enable it to manufacture and sell its product agreed to assign within seven days after shipments, the accounts receivable of credit sales made by it, and upon that security Dockendorff agreed to lend 80% of the net face value of such accounts as he should approve, less commissions and discounts up to \$175,000. Dockendorff's lien was to be for all sums due and to cover all accounts but he was not bound to lend on accounts not approved by him. It was found that neither petitioner nor the bankrupt knew that the latter was insolvent at the time of the supposed preference, and that the transfers were not made with intent to defraud creditors. The question presented was whether successive assignments of accounts by way of security in pursuance of a contract under which advances were made to enable the assignor to get the goods, on the faith of the undertaking that the accounts should be assigned, were bad because the contract embraced all accounts, although neither party contemplated any fraud.

The Supreme Court said:

“The advances were the means by which the bankrupt got the ownership of the goods. The

contract of itself would operate as a conveyance as soon as the rights to which it applied were acquired. *Field v. New York*, 6 N. Y. 179. We do not see why in the interval between the acquisition of the goods and the specific assignment of accounts, the right of general creditors without lien should intervene to defeat a security given in good faith, when, but for the promise of it, the property never would have come into the bankrupt's hands. There may have been a moment when the goods could have been attached, or when, if insolvency had been made known, as in *National City Bank v. [45] Hotchkiss, ante*, p. 50, it would have been too late to make the promised lien good. But in this case, the lien was acquired before any knowledge of insolvency, and before any attachment intervened."

This case is more like *National City Bank vs. Hotchkiss*, 231 U. S. 50. That case arose upon what is known in New York as a clearance loan. Brokers need large sums to clear or pay for the stocks that they receive in the course of the day, and as the stocks must be paid for before they are received and can be pledged to raise the necessary funds, these sums are advanced by the banks. They are returned later on the same day by making deposits to the borrower's account and drawing a check to the order of the bank. If a lien could have been on the loan or its proceeds until payment, such a lien is rarely created, as the whole business is to be finished within a few hours. The bankrupts were brokers, in partnership, and at 10 o'clock of January 19, 1910, had assets exceeding

their liabilities by nearly half a million dollars, consisting largely of a coal and iron company in which there was a pool. Before twelve, there was a break in the market, the stock went down and at about noon the suspension of the firm was announced. A petition in involuntary bankruptcy was filed at ten minutes after four on the same day. At about ten, the bank made a clearance loan to the bankrupts of \$500,000, in the usual way, to enable them to meet their current obligations and to get the stocks deliverable on that day, the bank receiving demand notes, both parties acting in good faith. By consent of the bank the loan was put into the general deposit account, which was drawn upon for general purposes, at least to the extent of the balance above the loan, and the securities released were not kept separate, but were used like any others. All moneys received in the course of the day [46] from whatever source, went into the firm's deposit account with the bank.

The Supreme Court said:

“As all trace of the bank's money was lost when it entered the stream of the firm's general property there can be no right of subrogation. Neither can a claim be upheld on the ground that there was no diminution of the bankrupt's assets, or that the transaction should be regarded as instantaneous and one. The consent to become a general creditor for an hour, that was imported, even if not intended to have that effect, by the liberty allowed to the firm, broke the continuity and established the loan as part of the assets. No doubt many general creditors have in-

creased a bankrupt's estate by their advances, but they have lost the right to take them back. Time sometimes can be disregarded when it is insignificant. But in this case half the time between the loan and the transfer of securities sufficed to change the positions of the borrowers from a fortune of half a million to a deficit of double that amount."

Nor can it be said that this case is within the line of the authorities which have to do with the incurring of running transactions and accounts between parties, wherein even after a creditor has been preferred, he in good faith gives the debtor further credit without security of any kind, for property which becomes a part of the debtor's estate. The amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him. Such is the case of *Wild vs. Provident Trust Co.*, 214 U. S. 292, wherein it was stated that the decision of the Court in all cases having therein this principle is based upon the broad principle that the dealings between creditors and the bankrupt after the bankrupt's insolvency, [47] where the net effect was to enrich the bankrupt's estate by the total sales, less the total payments, were not preferences. It assumes that by the subsequent dealings of the creditor with the bankrupt that the estate is unimpaired, for the property of the creditor getting into the debtor's estate is presumably the equivalent of the money value at which it was purchased. It in substance simply cancels the effect of the preference to the ex-

tent only that such preference no longer harms the interest of the other creditors. (*Peterson vs. Nash Bros.*, 112 Fed., 311, 7 A. B. R., 181; *McKey vs. Lee*, 5 A. B. R. 267, 105 Fed., 323.) In this class of cases the courts have used the expression that the running account of mutual sales and payments at short intervals should be treated as one transaction so that it should not be held that the effect of the payments was to enable creditors receiving payments to receive a greater percentage of their debts than other creditors of the same class. (*In re Saeger Bros.*, 121 Fed., 558, 9 A. B. R., 361.)

The case at bar, however, cannot be regarded as an instantaneous and one transaction. The continuity of the transaction was broken when the defendant William R. Staats Company agreed to wait for its money, and put the check through the second time and third time, and when it afterwards agreed to wait for the bankrupt to obtain funds from another deal or from other property, and when in fact it allowed the stock which it sold to the bankrupt to so far pass out of its hands that it could not reach forth and obtain it upon any rescission of the transaction. Thereafter it became a general creditor of the bankrupt. No doubt by its selling the stock to the Fielding J. Stilson Company it increased its estate, but so have many general creditors by their advances or transactions with the bankrupt. While the [48] defendant may have taken the mortgage in lieu of cash it was the security for an antecedent indebtedness absolutely due and owing from the Fielding J. Stilson Company to the defendant prior to the giving of the security.

The defendants have termed the giving of the security by the Fielding J. Stilson Company to defendant William R. Staats Company, as the making of a loan by said defendant to said bankrupt, but this transaction cannot be determined as a loan. A loan presupposes a new and present advancement to the borrower. It means the advancement of ready funds or property whereby the estate of the bankrupt would be increased at that time to the amount of the loan or to the amount of the actual cash advanced at that time. A loan is not the security or payment of an antecedent indebtedness as was the condition here presented. Property transferred by a borrower at the time of receiving a loan and for the purpose of making the lender safe is security for the then present indebtedness incurred and such would be recognized and enforced in bankruptcy, but security given for an antecedent indebtedness by an insolvent debtor, the effect of which is to give the creditor a greater percentage of its claim than other creditors of the same class, is a preference.

The giving of this security by the defendant when it was insolvent, as security for an antecedent indebtedness, due by it, had necessarily the effect of giving the defendant the William R. Staats Company, a greater percentage of its claim against the bankrupt than other creditors of the same class, and it must therefore be held that the bankrupt gave a preference by the giving of said security to said defendant.

4. It is further claimed on the part of the defendant, that the defendant William R. Staats Company when it received the security above described from

the bankrupt, did not have reasonable cause to believe that it was intended thereby to give a preference.
[49]

The circumstances surrounding this transaction have been as above related. The testimony further shows that when it was discovered that the check of the Fielding J. Stilson Company for \$12,900 given to the defendants William R. Staats Company, on the 19th day of March, 1912, had been refused payment for want of funds, that Stilson at first assured Mr. Jardine that this check would be paid and for him to put the check through the next day; that the next day the check was again put through the bank, even twice at Stilson's request, and each time returned rejected for want of funds, and at that time Mr. Stilson told Mr. Jardine that they had other checks amounting to \$8,000. that had met with the same fate and which were outstanding, but that they would take care of William R. Staats Company and see that they were protected. Mr. Jardine does not contradict this statement except by his statement that he has no recollection that Mr. Stilson so told him, and I must therefore find that the defendant William R. Staats Company not only knew that the check given them had been rejected but that they had notice that other checks of the bankrupt were outstanding which had been rejected for the same reason of want of funds. These circumstances were sufficient to put a reasonably prudent man upon inquiry.

If the circumstances are such as would lead an ordinarily prudent man of affairs to the conclusion that his debtor is insolvent, he obtains a preferential pay-

ment within the meaning of the statute, by accepting payment in whole or in part of the debt, where the transaction takes place within four months prior to adjudication and other creditors of the same class, because of the greater percentage received, must accept increased dividends. (Rogers vs. Halibut Co., 31 A. B. R. 576.) It is enough to constitute a reasonable cause to believe a debtor insolvent, that the facts and circumstances with reference to [50] the debtor's financial condition which are brought home to the creditor are such as would put an ordinarily prudent man upon inquiry, which if pursued, would lead to knowledge of insolvency. (Bardes vs. First National Bank of Hawarden, 11 A. B. R. 771, 122 Iowa, 443.) Reasonable cause to believe that it was intended to give a preference does not require proof that the defendant had either actual knowledge or actual belief, but only such surrounding circumstances as would lead an ordinarily prudent business man to conclude such a preference was intended. (Sundheim vs. Ridge Avenue Bank, 15 A. B. R., 132-134, 138 Fed. 951.) Circumstances such as these were held sufficient to put a reasonably prudent man upon inquiry to ascertain the financial condition of the debtor, in Mechanics' Bank vs. Ernst, 231 U. S. 60, and in R. H. Herron Co. vs. William H. Moore, 31 A. B. R., 221; In re Dorr, 25 A. B. R. 505, 196 Fed. 292; In re Thomas Deutschle & Co., 25 A. B. R., 348, 182 Fed. 435. See, also, 2 Remington on Bankruptcy, Section 1396, and cases cited.

It is not a sufficient answer to this proposition to say that Mr. Stilson told Mr. Jardine that the bank-

rupt concern was solvent, or that Stilson Company had previously had checks carried for a day or two and afterwards paid, or that they bore an excellent reputation. This case is brought within the statute by holding that the defendants had constructive knowledge of what they would have ascertained had they inquired and the effect of constructive knowledge is the same always as actual knowledge. (Ogden vs. Reddish, 29 A. B. R. 531, 200 Fed. 977.)

I therefore find that said bankrupt having given a preference, that William R. Staats Company receiving the same and having benefited thereby, had reasonable cause to believe that it was intended by the giving of said security to give a preference and that the said trust deed so given is voidable at the instance of the trustee in bankruptcy. [51]

5. Wherefore, as conclusions from the foregoing, I do find that said bankrupt within four months of the filing of the petition, made a transfer of its property, to wit, the execution and delivery unto the defendant, the Title Insurance & Trust Company of a deed of trust, a copy of which is attached to the complaint herein, and which deed of trust was executed and acknowledged and recorded in the office of the county recorder of Los Angeles County, California, on the 20th day of March, 1912, in book 4924, page 186 of deeds of Los Angeles County Records, and was made and received as security for an indebtedness amounting to \$3,870.00, then due the defendant William R. Staats Company from the said bankrupt and that the effect of the enforcement of such transfer was to enable the said defendant William

R. Staats Company to obtain a greater percentage of its debt than other creditors of the said bankrupt of the same class, and that the said defendant William R. Staats Company at the time of the receiving of said transfer having had reasonable cause to believe that it was intended thereby to give a preference, that said transfer is voidable by the trustee herein and should be set aside, cancelled and annulled.

I return herewith the reporter's transcript of the testimony taken on this hearing, together with the exhibits therein referred to, and also return the files and papers in said cause.

Inasmuch as this is a special reference, referred to me as Special Master, and not a matter pertaining to my duties as referee in bankruptcy, a reasonable allowance should be made for Master's fees in this proceeding.

Respectfully submitted,

LYNN HELM,
Special Master.

Master's fees, \$——.

Reporter's fees, \$74.00. [52]

[Endorsed]: No. 235—Civil. In the United States District Court, Southern District of California, Southern Division. In the Matter of Fielding J. Stilson Company, Bankrupt. Special Master's Report. Filed Jun. 17, 1915, at 30 min. past 9 o'clock A. M. Lynn Helm, Referee. C. Meade, Clerk. Lynn Helm, 918 Title Insurance Building, Los Angeles, Cal. Filed June 18, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [53]

*In the District Court of the United States, for the
Southern District of California, Southern Divi-
sion.*

No. 235—CIVIL.

SECURITY TRUST & SAVINGS BANK, a Cor-
poration, Trustee in Bankruptcy of FIELD-
ING J. STILSON COMPANY, a Corpora-
tion, Bankrupt,

Complainant.

vs.

WM. R. STAATS COMPANY, a Corporation, and
TITLE INSURANCE & TRUST COM-
PANY, a Corporation,

Defendants.

Exceptions to Report of Special Master.

To the Honorable Judges of the United States Dis-
trict Court, Southern District of California:

NOW COME Wm. R. Staats Company and Title
Insurance & Trust Company, defendants in the
above-entitled action, and except both generally and
specially to the report of Lynn Helm, Esquire, the
Special Master, filed in this cause on or about the
17th day of June, 1915, and for cause of exception
show:

First. That said cause was improperly and er-
roneously referred to said Special Master over the
objection of these defendants.

Second. That the Master has in said report stated
and certified that the Deed of Trust therein referred
to constituted and amounted to a preference, and

that the effect of the enforcement of such answer was and is to enable defendant Wm. R. Staats Company to obtain a greater percentage of its debt than other creditors of said bankrupt of the same class, and was and is voidable at the option of the trustee in bankruptcy, whereas, he should have found that the same did not constitute a preference, [54] and that the effect of the enforcement of such transfer was not and would not be to enable said defendant Wm. R. Staats Company to obtain a greater percentage of its debt than other creditors of said bankrupt of the same class, and that the said deed of trust is not voidable at the option of said trustee in bankruptcy or at all, but is valid.

Third. The Master has found and determined that the said deed of trust was executed to secure an antecedent indebtedness, and that the transaction between said Fielding J. Stilson Company and said Wm. R. Staats Company was not a single transaction, whereas, he should have found and held that said deed of trust was given for a present valuable and fair consideration, and that said transaction between said bankrupt corporation and said Wm. R. Staats Company should be treated and held as one transaction.

Fourth. Said Master has found that said Fielding J. Stilson Company was at the time of giving the alleged preference insolvent, whereas, he should have found that said company was at said time solvent.

Fifth. In that the Master states that there is positive evidence that the 60 shares of stock therein referred to had been hypothecated by the bankrupt cor-

poration prior to the execution of said deed of trust, whereas the testimony does not justify such statement, conclusion or finding, nor does the record show that if said shares of stock or any of them, or the due bill for 140 shares of stock had been hypothecated prior to said time they were hypothecated to a bona fide purchaser for value and without notice.

Sixth. In that the Master has found that the effect of said deed of trust will be to enable defendant Wm. R. Staats Company to get a greater percentage of its claim than other creditors of the same class, whereas, the evidence does not justify such a finding or conclusion. [55]

Seventh. In that the Master has found that defendant Wm. R. Staats Company at the time of the execution of said deed of trust had reasonable cause to believe that preference was thereby intended, whereas, the evidence does not justify such finding or conclusion.

Eighth. That the Master should have found and recommended that a decree be entered dismissing the bill with costs to the defendants.

Ninth. That the Master erred in each and every of the following rulings on evidence: (The reference being to the page of the reporter's transcript of the evidence on which such matters are found.)

In overruling defendants' objection to the offer of petition in bankruptcy, the report of the Special Master, the order confirming the report of the Special Master, and the order of adjudication (page 2).

In overruling defendants' objection to the question, "Do the schedules correctly state your liabili-

ties as to the time they were filed? (Page 5.)

In overruling defendants' objection to the question, "Was there any change in the assets and liabilities of the Fielding J. Stilson Company, a bankrupt, between the 19th day of March, 1913, and the date of filing of schedules in bankruptcy?" (Pages 9 and 10.)

In overruling defendants' objection to the question, "You didn't incur any liabilities, that is the corporation didn't incur any liabilities, after the 19th day of March?" (Page 12.)

In admitting the schedules in bankruptcy over defendants' objection. (Page 13.) And

In overruling defendants' objection and motion to strike out the schedule in bankruptcy. (Page 14.)

In overruling defendants' objection to the question, "Explain these items and state what the value of each one of them was at that time, and state the reasons why you so state." [56] (Page 17.) And similar questions calling for witness's opinion as to the value of the various items listed in said schedule.

In overruling defendants' objection to the question, "Was that claim of \$11,000 due to the Fielding J. Stilson Company collectible, and if so, in what manner?" (Page 22.)

In overruling defendants' objection to the question, "What was the value of the indebtedness?" (Page 22.)

In overruling defendants' objection to the question, "Will you kindly go through this list—chooses in action, debts due petitioner on open accounts, and

state what the value was of each of these up to or on March 19th, 1912, and at any time subsequent to that time?" (Page 23.) And similar questions along the same line.

In overruling defendants' objection to the question, "Mr. Stilson, I will now renew the question which was asked of you at the last hearing, and will ask you whether the schedules in bankruptcy filed herein actually schedule the amount of the indebtedness of the Fielding J. Stilson Company at the time the schedules were filed on the 27th day of November, 1912"? (Page 33.) And succeeding questions subject to *sqme* objection.

In denying defendant's motion to strike out the testimony of witness, J. A. Craig. (Page 73.)

In sustaining plaintiffs' objection to the question, "I will ask you if you had ever had any conversations or made any inquiries of anyone prior to this time as to the financial condition of the Fielding J. Stilson Company, and if so state of whom you inquired and when?" (Page 83.)

In sustaining plaintiffs' objection to the question, to Witness Jardine—"I will ask you what was the reputation of the Fielding J. Stilson Company on the Stock Exchange and in financial circles, as to its financial responsibility." (Page 85.) [57]

In sustaining plaintiff's objection to the questions asked of witness Jardine (page 85), "Now, at the time you took this deed of trust, or at any time prior to this, did you know that the Stilson Company was insolvent?" And, "Did you find it to be insolvent?"

WHEREFORE, defendants pray that these ex-

ceptions be sustained, and a decree entered dismissing said bill with costs to defendants.

O'MELVENY, STEVENS & MILLIKIN,
WALTER K. TULLER,

Solicitors for Defendants.

[Endorsed]: (Original.) No. 235—Civil. In the United States District Court, in and for the Southern District of California, Southern Division. Security Trust & Savings Bank, a Corporation, Trustee in Bankruptcy of Fielding J. Stilson Company, a Corp., Bankrupt, Complainant, vs. Wm. R. Staats Company, a Corporation, and Title Insurance & Trust Company, a Corp., Defendants. Exceptions to Report of Special Master. Received Copy of the Within this 28th day of June, 1915. W. T. Craig, Attorney for Complainant. O'Melveny, Stevens & Millikin, Suite 825, Title Insurance Bldg., N. E. Corner Fifth & Spring Sts., Los Angeles, Cal., Attorneys for Defendants. Filed Jun. 30, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [58]

**[Order Overruling Exceptions 1-4 and Sustaining
Exceptions 2, 3, 5, 6, 7 and 8, and Dismissing
Bill of Complaint.]**

At a stated term, to wit, the July term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the City of Los Angeles, on Friday, the sixteenth day of July, in the year of

our Lord, one thousand nine hundred and fifteen. Present: The Honorable OSCAR A. TRIPPET, District Judge.

No. 235—CIVIL, S. D.

SECURITY TRUST AND SAVINGS BANK, as
Trustee, etc.,

Complainant,

vs . .

WILLIAM R. STAATS COMPANY et al.,
Defendants.

This cause coming on this day to be heard on exceptions to the report of the Special Master; W. T. Craig, Esq., appearing as counsel for complainant; Walter K. Tuller, Esq., appearing as counsel for defendants; and an opening statement having been made by Walter K. Tuller, Esq., of counsel for defendants, who also reads to the Court said report of Special Master; and said exceptions having been argued, in support thereof, by Walter K. Tuller, Esq., of counsel for defendants, and in opposition thereto by W. T. Craig, Esq., of counsel for complainant; and said cause having been submitted to the Court for its consideration and decision on said exceptions and the argument thereof; it is now by the Court ordered that exceptions numbers 1 and 4 be, and they hereby are overruled, and that exceptions numbers 2, 3, 5, 6, 7 and 8 be, and they hereby are sustained, the Court withholding ruling on exception number 9; and it is further ordered that the bill of complaint herein be dismissed, a decree accord-

ingly to be hereafter presented for action by the Court. [59]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 235.

SECURITY TRUST & SAVINGS BANK, a Corporation, Trustee,

Complainant,

vs.

WM. R. STAATS COMPANY, a Corporation, et al.,
Defendants.

Decree

THIS CAUSE came on to be heard at this term and was argued by counsel. Thereupon, upon consideration thereof, it was ORDERED, ADJUDGED and DECREED, as follows, viz.:

THAT the complainant's bill of complaint be and the same is hereby dismissed, and that defendants do have and recover from complainant the sum of Fifty 80/100 (\$50.80) Dollars, being defendants' proper and necessary costs and disbursements herein.

OSCAR A. TRIPPET,

Judge.

Dated July 20, 1915.

Decree entered and recorded July 20, 1915.

WM. M. VAN DYKE,

Clerk.

By Leslie S. Colyer,

Deputy Clerk. [60]

[Endorsed]: (Original.) No. 235. In the United States District Court, in and for the Southern District of California, Southern Division. Security Tr. and Sav. Bank, a Corporation, Trustee, Complainant, vs. Wm. R. Staats Company, a Corporation et al., Defendants. Decree. Filed Jul. 20, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. O'Melveny, Stevens & Millikin, Suite 825 Title Insurance Bldg., N. E. Corner Fifth and Spring Sts., Los Angeles, Cal., Attorneys for Defendants. [61]

Summary of Debts and Assets [In Re Stilson, Bankrupt].

SUMMARY OF DEBTS AND ASSETS.

(From the Statements of the Bankrupt in Schedules "A" and "B.")

Schedule A.... 1 (1)	Taxes and Debts due United States.....	
Schedule A.... 1 (2)	Taxes due States, Counties, Districts and Municipalities	117.50
Schedule A.... 1 (3)	Wages	
Schedule A.... 1 (4)	Other debts preferred by law.....	
Schedule A.... 2	Secured claims	125,167.25
Schedule A.... 3	Unsecured claims	117,176.12
Schedule A.... 4	Notes and bills which ought to be paid by other parties thereto	
Schedule A.... 5	Accommodation paper	15,300.00
	Schedule A, total	257,760.87
Schedule B.... 1	Real Estate	227,520.00
Schedule B.... 2-a	Cash on hand	
Schedule B.... 2-b	Bills, promissory notes and securities.....	23,802.54
Schedule B.... 2-c	Stock in trade.....	
Schedule B.... 2-d	Household goods, etc.,.....	
Schedule B.... 2-e	Books, prints and pictures.....	
Schedule B.... 2-f	Horses, cows and other animals.....	
Schedule B.... 2-g	Carriages and other vehicles.....	
Schedule B.... 2-h	Farming stock and implements.....	

Schedule B.... 2-i	Shipping and shares in vessels.....	
Schedule B.... 2-k	Machinery, tools, etc.	1,185.63
Schedule B.... 2-l	Patents, copyrights and trademarks.....	
Schedule B.... 2-m	Other personal property.....	2,433.88
Schedule B.... 3-a	Debts due on open account.....	13,949.03
Schedule B.... 3-b	Stocks, negotiable bonds, etc.	10,895.60
[62]		
Schedule B.....3-c	Policies of insurance.....	500.00
Schedule B.... 3-d	Unliquidated claims	
Schedule B.... 3-e	Deposits of money in banks and else- where	11.43
Schedule B.... 4	Property in reversion, remainder, trust, etc.	
Schedule B.... 5	Property claimed to be excepted.....	
Schedule B.... 6	Books, deeds and papers.....	
Schedule B. total		280,298.11

FIELDING J. STILSON COMPANY,
By FIELDING J. STILSON,
Pres. Bankrupt. [63]

**Schedule “A”—Statement of All Debts of Bankrupt
[In Re Stilson, Bankrupt].**

SCHEDULE A. (1)

Statement of All Creditors Who are to be Paid in
Full or to Whom PRIORITY IS SECURED by
Law.

Dollars. Cents.

(1) Taxes and debts due and owing to
the United States. Claims which have
priority.

Reference to Ledger or Voucher,—Names
of Creditors.—Residence (if unknown, that
fact to be stated). Where and when con-
tracted.—Nature and consideration of the
debt, and whether contracted as a partner
or joint contractor; and if so, with whom. **NONE.**

(2) Taxes due and owing to the State of

California or to any County, district or municipality thereof.

Reference to Ledger or Voucher.—Names of Creditors.—Residence (if unknown, that fact to be stated). Where and when contracted.—Nature and consideration of the debt, and whether contracted as a partner or joint contractor; and if so with whom.

Corporation Tax, due the State of California, with penalty.....	60.00
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State Franchise Tax, and penalty.....	57.50
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State and County Taxes for the last half of 1911–1912 and for 1912–1913 are unpaid on all real property described in Schedule B (1), the exact amount of which is unknown to affiant.

NOTE: The above corporation is to be paid by the Title Ins. & Trust Co., under Escrow #97,394, and the State Franchise Tax was paid by said Title Ins. & Trust Co. under Escrow #97,111. [64]

(3) Wages due workmen, clerks or servants to an amount not exceeding \$300 each, earned within three months before filing this petition.

Reference to Ledger or Voucher.—Names of Creditors.—Residence (if unknown, that fact to be stated). Where and when contracted.—Nature and consideration of the debt, and whether contracted as a partner or joint contractor; and if so, with whom.

NONE.

Dollars. Cents.

(4) Other debts having priority by law.

Reference to Ledger or Voucher.—Names of Creditors.—Residence (if unknown, that fact to be stated). Where and when contracted.—Nature and consideration of debt, and whether contracted as a partner or joint contractor; and if so, with whom. NONE.

Total,..... 117.50

FIELDING J. STILSON COMPANY,
By FIELDING J. STILSON,
Pres. Bankrupt. [65]

SCHEDULE A. (2)

CREDITORS HOLDING SECURITIES.

(N. B.—Particulars of Securities held, with dates of same, and when they were given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by the Acts of Congress relating to Bankruptcy; and whether contracted as partner or joint contractor with any other person, and if so, with whom.)

Reference to Ledger or Voucher. Names of Creditors.—Residence (if unknown, that fact must be stated). Description of securities.—When and where debts were contracted.—

Value of Securities.	Dollars. Cents.
Richard B. Kirchhoffer, I. W. Hellman Bldg., Los Angeles, Cal. Money loaned. Evidenced by contract to buy stocks. Secured by 50,000 shares Oleum Development Co. stock.	1,050.00

Value of Securities.

Dollars. Cents.

John C. Rupp, H. W. Hellman Bldg., Los Angeles, Cal. Money loaned. Evidenced by contract to buy stocks. Secured by 30,000 shares Oleum Development Co. stock.....	750.00
A. H. Woolacott, I. W. Hellman Bldg., Los Angeles, Cal. Money loaned. Evidenced by contract to buy stocks. Secured by 50,000 shares Oleum Development Co. stock.....	1,125.00
Mary D. Spalding, 134 N. Gets, Los Angeles, Cal. Money loaned. Evidenced by note dated 4/9/12, due 1 year, interest 7%. Secured by 15 shares San Diego Home stock, valued at \$100.00, and 80 shares University Club Holding Co. stock, valued at \$800.00.....	750.00

[66]

W. R. Staats Co., 4th St., Los Angeles, Cal.....	3,870.00
Purchase of stocks. Evidenced by note dated 3/19/12, due 1 day, interest 7%, payable monthly. Secured by Trust deed on the following lots in Angeleno Heights Tract:	
Lot 17, Block 9.	
Lots 2, 3, 6 and 7, Block 11.	
Lots 66, 67, 68 and 69, Block 15½.	
Lot 43, Block 16.	

Value of Securities.

Dollars Cents.

Lot 5, Block 20.

Lots 3 and 27, Block 29.

Lots 1 and 16, Block 25.

Chas. M. Stimson, 901 California Bldg.,
Los Angeles, Cal..... 1,860.00

Contract to purchase real estate.
Evidenced by note dated Sep. 12th,
1911, due ———, interest 7%. Se-
cured by Lots 47, 49, 55 and 57, Block
14, Angeleno Heights Tract.

Chas. M. Stimson, 901 California Bldg.,
Los Angeles, Cal..... 1,240.00

Contract to purchase real estate.
Evidenced by note dated Sep. 12th,
1911, due ———, interest 7%. Se-
cured by contract to purchase Lots
39 and 41, Block 14, Angeleno
Heights Tract. Interest on above
notes due Stimson, to Sep. 12th,
1912..... 220.77

Chas. M. Stimson, 901 California Bldg.,
Los Angeles, Cal..... 4,000.00

Stock loaned. Secured by 25 shares
Union Oil Stock valued at \$2,500.00,
and 15 shares Union Provident Stock,
valued at \$1,500.00 *toge*, 8 dividends
accured on said stock since Febru-
ary, 1912..... 192.00

[67]

Merchants' National Bank, Los Angeles,
California..... 13,500.00

Value of Securities.

Dollars Cents.

Money loaned. Evidenced by note dated Sep. 11th, 1911, due 1 day, interest 7%. Secured by Trust Deed on the following lots in Angeleno Heights Tract:

Lot 63, Block 14.

Lot 48, Block 17.

Lot 6, Block 28 $\frac{1}{2}$.

Also secured by San Julian Street property, described on page 7-a of this Schedule.

Security Savings & Trust Co. Los Angeles, California.....	1,250.00
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Money loaned. Evidenced by note of \$2,500.00, on which payment of \$1,250.00 has been made, dated 4/7/11, due 1 day, interest 6%. Secured by 7 Riverside Home Telegraph Co. Bonds, valued at \$1,400.00.

Security Trust & Savings Bank. Los Angeles, California.....	3,000.00
---	----------

Money loaned. Evidenced by note dated 11/4/10, due 3 years, interest 7%. Secured by mortgage on W. 35 ft. of E. 116 ft. of Lot 1, Block F, Mott Tract, known as 511 W. 1st St. This is now the property of the Los Angeles-California Realty Company, but under terms of contract in which same was transferred from bankrupt

Value of Securities.

Dollars Cents.

to said company, bankrupt was to
pay mortgage.

Total.....32,807.77

FIELDING J. STILSON COMPANY,

By FIELDING J. STILSON,

Pres. Bankrupt. [68]

SCHEDULE A (2) Cont'd.

Forwarded \$32,807.77

Security Trust & Savings Bank, Los
Angeles, Cal..... 3,000.00

Money loaned. Evidenced by note
dated 10/26/07, due three years, in-
terest 7%. Secured by Lots 1 and
2, Block 22, Angeleno Heights Tract.
This has not been renewed.

Security Trust & Savings Bank, Los
Angeles, Cal..... 2,500.00

Money loaned. Evidenced by note
dated 8/25/10, due three years, in-
terest 6%. Secured by mortgage on
Lots 66, 67, 68 and 69, Block 15½,
Angeleno Heights Tract. This mort-
gage is signed by Mary Brant.

Jennie S. Chapman, c/o L. M. Chapman,
Ferguson Bldg., L. A..... 4,000.00

Money loaned. Evidenced by note
dated 9/18/08, due 3 years, interest
7%. Secured by Lots in Angeleno
heights, as follows:

Lot 5, Block 20.

Lots 1 and 16, Block 25.

Value of Securities.

Dollars Cents.

Lot 45 and part of Lot 47, Block 28.

Lot 3 and a certain portion of Lot
27, Block 29.

On or about 8/13/11, Jennie S. Chapman released Lots 45 and 47, Block 28, and accepted in lieu thereof 5,000 shares of the capital stock of Feilding J. Stilson Company.

Citizens' National Bank, Los Angeles,
California..... 13,500.00

Money loaned. Evidenced by note dated 11/4/09, due 1 day, interest 7%, in the principal sum of \$16,750, on which payments of \$3,250.00 have been made. Secured by Trust Deed on following lots in [69] Angeleno Heights:

Los 17, Block 9.

Lot 7, Block 10.

Lots 2, 3, 6 and 7, Block 11.

Lots 4 and 5, Block 13.

Lots 38, 44, 46, 52 and 54, Block 14.

Lots 6, 8, 10, 12, 17-20, 25 and 26,
Block 14½.

Sallie F. McClure, 154 W. 21st St., Los
Angeles..... 4,000.00

Money loaned. Evidenced by note dated 12/15/09, due 3 years, interest 7%. Secured by Lots 6 and 7, Block 26, Lot 19 in Block 31, and Lot 15, Block 24, Angeleno Heights Tract. Lots 6 and 7, Block 26, and Lot 15,

Value of Securities.

Dollars Cents.

Block 24, were property of Carroll A. Stilson when mortgage was made and were loaned to company, who received the \$4,000.00. They now stand in name of Carroll A. Stilson.

Florence Johnston, Kingsley Drive, Los Angeles, Cal..... 3,500.00

Money loaned. Evidenced by note dated 6/2/11, due 3 years, interest 7%. Secured by Lot 54, Block 14, Lot 84 in Block 15½, and Lot 48, Block 17, Angeleno Heights Tract.

Martha M. Fisher, c/o W. H. Allen & Sons, Douglas Bldg., L. A..... 3,500.00

Money loaned. Evidenced by note dated 7/26/11, due 3 years, interest 7%. Secured by Lot 45 and S. E. 54.5 ft. of Lot 47, Block 28, and Lot 11, Block 31, Angeleno Heights Tract.

[70]

N. C. Cramer, German Am. Svgs. Bk., Los Angeles..... 2,250.00

Money loaned. Evidenced by note dated 7/17/11, due 3 years, interest 7%. Secured by Lots 61, 62 and 63, Block 14, and Lot 6, Block 28½. Angeleno Heights.

Total..... 69,057.77

FIELDING J. STILSON COMPANY,

By FIELDING J. STILSON,

Pres. Bankrupt. [71]

Value of Securities.

Dollars. Cents.

SCHEDULE A (2) Cont'd.

Forwarded \$79,807.77

S. F. Keller, c/o Coyne & Coyne, Los Angeles..... 10,000.00

Money loaned. Evidenced by note dated 8/26/07, due 3 years, interest 7%. This note was renewed 8/26/10, for three years, bearing interest at 6½%. Secured by mortgage on San Julian Street property, more particularly described in Schedule B (1), page 7-a. Note and mortgage signed by Olivia Bollinger.

Florence Ingram, Panama Hotel, 2nd & Flower, Los Angeles..... 750.00

Money loaned. Evidenced by note dated 8/22/11, due 3 years, interest 7%. Secured by Lot 17, Block 31, Angeleno Heights Tract. Note and mortgage signed by Mary Brant.

Pacific Mutual Life Ins. Co., Los Angeles, Cal..... 38,859.48

Evidenced by notes, the exact description of which said bankrupt does not have at this time. This indebtedness is secured by mortgages on Lots 35, 37, 45, 51, 53 and 59, Block 14; Lots 1 to 4, 19, 21, 27, 29 and 45, Block 15; Lots 53 and 55, Block 15½; Lots 8, 10, 12, 13, 16, 18, 20, 34, 36 and 43, Block 16; Lots 26, 32 and 34, Block 18; Lot 3, Block 27;

Value of Securities.

Dollars Cents.

Lots 67, 67, 69 and 70, Block 28; and
 Lots 8 and 10, Block 30, all in Angeleno Heights Tract.

Street Bonds, of Los Angeles City..... 6,500.00

This amount is estimated. There is also interest due on the principal on Jan. 1st, 1912, and also on July 1st, 1912.

Total.....\$125,167.25

FIELDING J. STILSON COMPANY,

By FIELDING J. STILSON,

Pres. Bankrupt. [72]

SCHEDULE A (3).

CREDITORS WHOSE CLAIMS ARE.

UNSECURED.

(N. B.—When the name and residence (or either) of any drawer, maker, endorser or holder of any bill or note, etc., are unknown, the fact must be stated; also, the name and residence of the last holder known to be the debtor. The debt due to each creditor must be stated in full, and any claim by way of setoff stated in the schedule of property.)

Reference to Ledger or Voucher. Name of Creditors. Residence (if unknown, that fact to be stated). When and where contracted. Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor with any other person; and if so, with whom.

The following debts, incurred within two years last past, account of stock sold:

Value of Securities.	Dollars Cents.
R. G. Beebe, California Club, Los Angeles, Cal.....	4,987.50
J. C. Bowen, 811 S. Main St., Los Angeles, Cal.....	.62
Nat Boas, 454 Montgomery St., San Francisco.....	1.50
S. F. Baker, Santa Barbara, Cal.....	400.00
Chas. L. Crawford, 217 Stimson Bldg., Los Angeles, Cal.....	.75
C. W. Cordin, Nat'l Military Home, Virginia.....	4.00
(This amount paid personally by Carroll A. Stilson April 26th, 1912.)	
J. J. Doran, 119 W. 4th St., Los Angeles, Cal.....	15.00
William Davies, 1217 E. Vernon, Los Angeles, Cal.....	530.20
Max P. Fries, unknown.....	48.00
(\$24.00 of this account paid by F. J. Stilson April 9th, 1912.) [73]	
August Levy, S. Flower St., Los Angeles, Cal.....	24.95
Chas. J. Lehman, S. Spring St., Los Angeles, Cal.....	221.25
H. P. Oates, H. W. Hellman Bldg., Los Angeles.....	3.50
J. D. Radford, Hibernian Savings Bank, Los Angeles.....	2,775.00
Howard Surr, San Bernardino, Cal.....	2.85
Chas. W. Spencer, San Diego, Cal.....	28.00
(This paid by F. J. Stilson April 22, 1912.)	

Value of Securities.

Dollars Cents.

Dr. J. W. Trueworthy, Byrne Bldg., Los Angeles, Cal.....	2,768.50
(This includes an item of \$6.00, account check of F. J. S. Co., which was lost for nearly a year and at the time it was located the company no longer had any funds with which to take care of it.)	
Mrs. Ida B. Trueworthy, Byrne Bldg., Los Angeles, Cal.....	2,210.00
A. H. Thomas, L. A. Trust & Svgs. Bank, Los Angeles.....	.25
Harry Gray, Central Bldg., Los Angeles, Cal.....	2,500.00
The following account money paid for purchase of stocks:	
Olive E. Bigelow, Alhambra, Cal.....	1,130.65
Herman A. Jaeger, 623 N. May St., Chicago, Ill.....	39.85
Chas. Jones, 425 Court St., Los Angeles, Cal.....	135.00
(Evidenced by note dated ———, due ———, int.)	
Geo. D. Keym, N. Grand Ave., Los Angeles, Cal.....	167.50
W. E. Lester, 732 E. Hollywood Bldg., Los Angeles.....	25.15
Mrs. A. J. Reithmuller, Santa Monica, Cal.....	1,995.00
(Bonds sold.)	
C. S. Young, University Club, Los Angeles, Cal.....	70.00

Value of Securities.

Dollars Cents.

(Dividend due on stock of Mr. Young, held in the name of a stenographer of F. J. S. Co.) [74]	
Blankenhorn & Rath, Security Bldg., Los Angeles, Cal.....	4,912.50
A. L. Jameson, Security Bldg., Los Angeles, Cal.....	173.10
Geo. H. Letteau, Security Bldg., Los Angeles, Cal.....	2,395.75
(Consideration of last three stocks bought.)	
Thos. F. Bixby, 200 W. Jefferson St., Los Angeles.....	1,000.00
(Money loaned. Evidenced by note dated 2/1/12, due 8/1/12, interest 8%.)	
Julia B. Bixby, 200 W. Jefferson St., Los Angeles.....	1,000.00
(Money loaned. Evidenced by note dated 2/1/12, due 8/1/12, interest 8%.)	
Mrs. M. J. F. Stearns, c/o Ed Young Story Bldg., Los Angeles.....	2,500.00
(Money Loaned)	
Total.....	32,066.37

FIELDING J. STILSON COMPANY.

By FIELDING J. STILSON,

Pres. Bankrupt. [75]

SCHEDULE A. (3) CONTINUED.

CREDITORS WHOSE CLAIMS ARE
UNSECURED.

(N. B.)—When the name and resident (or either) of any drawer, maker, endorser or holder of

any bill or note, etc., are unknown, the fact must be stated, also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of setoff stated in the schedule of property.

Reference to Ledger or Voucher.—Names of Creditors.—Residence (if unknown, that fact to be stated). When and where contracted.—Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor with any other person; and if so, with whom.

Value of Securities. Dollars Cents.

Forwarded..... 32,066.37

The following debts due on account of stocks delivered over by claimants to bankrupt for manipulation on the Stock Market, and which were to be returned to claimants. The values placed on these stocks are the market value on April 22d, 1912, the date of the Trust Agreement entered into by bankrupt and its creditors, later voided by these bankruptcy proceedings;

Katherine Loeser, 20 Cherry St., San Francisco, Cal.....	2,000.00
Alice Adams, c/o R. G. Beebe, Cal., 20 Home Pfd., Club, Los Angeles.....	600.00
R. G. Beebe, California Club, 100 Homee Pfd., Los Angeles, Cal.....	3,000.00

Value of Securities.

Dollars Cents.

R. L. Horton, Henne Bldg., Los Angeles, Cal., 60 Home Pfd.....	1,800.00
G. D. Cadwalader, c/o L. A. Brick Co., Security Bldg., Los Angeles, Cal., 65 U. S. Long Distance Tel. Co.....	780.00
Dr. J. H. Bullard, Bullard Block, Los Angeles, Cal., 50 Home Savings....	6,250.00
Herbert Burdette, Consolidated, Realty Bldg., Los Angeles, 10 Union Oil Company.....	981.25
Wm. Miller, c/o M. A. Newmark & Co., Los Angeles, 20 Union Oil Company.	1,962.50
John E. Marble, H. W. Hellman Bldg., Los Angeles, Cal., 10 Union Oil Com- pany.....	981.25
Chas. M. Stimson, 901 California Bldg., Los Angeles, 25 Union Oil Com- pany.....	2,453.12
Dr. J. W. Trueworthy, Byrne Bldg., Los Angeles, Cal., 10 Union Oil Com- pany.....	981.25
M. T. Whitaker, Security Bldg., Los An- geles, Cal., 50 Union Oil Company..	4,906.25
Shirley Ward, Union Oil Bldg., Los An- geles. Cal., 30 Union Oil Company..	2,943.75
Cloyd G. Guyer, Central Bldg., Los An- geles, Cal., 30 Union Prov.....	2,940.00
Chas. M. Stimson, 901 California Bldg., Los Angeles, 15 Union Prov.....	1,470.00
W. E. Lester, 732 E. Hollywood Blvd., Hollywood, Cal., 50 Amalgamated Oil Company.....	2,950.00

Value of Securities.

Dollars Cents.

E. F. L. Nevin, 634 Belmont Ave., Los Angeles Cal., 10 Mexican Common..	567.50
Lawrence Lippert, W. Jefferson St., Los Angeles, Cal., 38 American Pet. Com.....	1,643.50
Dr. J. W. Trueworthy, nByrne Bldg., Los Angeles, Cal., 100 American Pet. Com.....	4,325.00
[77]	
Mrs. Ida B. Trueworthy, Byrne Bldg., Los Angeles, Cal., 50 American Pet. Com.....	2,162.50
Jacob Windish, 559 E. 33rd St., Los Angeles, Cal., 28 American Pet. Com.....	1,211.00
W. E. Lester, 732 E. Hollywood Blvd., Hollywood, Cal., 1000 Palmer Oil...	700.00
500 Belmont.....	5,075.00
1000 West End.....	2,100.00
E. J. Yound, Laughlin Bldg., Los Angeles, Cal., 500 Rescue Eula. Purchased and carried on margin.....	145.00
Geo. Rathbun, Wilcox Bldg., Los Angeles, Cal., 1500 United Oil Company.....	450.00
C. J. Lehman, S. Spring St., Los Angeles, Cal., 10,000 Consolidated Mines.....	575.00
C. Montgomery, c/o Montgomery Bros., Los Angeles, 8000 National Pacific..	240.00

 Total..... 88,260.24

FIELDING J. STILSON COMPANY.

By FIELDING J. STILSON,

Pres. Bankrupt.

Value of Securities.

Dollars Cents.

(4a)

SCHEDULE A (3), Cont'd.

Forwarded.....\$ 88,260.24

Mrs. Anna Hilfrich, 241½ E. 4th St., Los
Angeles, 30 San Diego Home Tel.
Co..... 150.00

The following accounts for advertising:

Dake Advertising Agency, 432 S. Main,... 651.34
(Disputed) Los Angeles.

[78]

B'nai B'rith Messenger, 925 W. 7th, Los
Angeles..... 30.00
Blade Pub. Co., Santa Ana, Cal..... 6.60
Daily Telegram, Long Beach, Cal..... 16.00
Commercial & Financial Chronicle, New
New York City..... 12.50
The Express, Los Angeles, Cal..... 308.44
The Los Angeles Examiner, Los Angeles,
Cal..... 228.47
Evening Herald, Los Angeles, Cal..... 77.76
Los Angeles Times, Los Angeles, Cal..... 291.38
The Graphic, Los Angeles, Cal..... 16.20
The Oil Bradstreet, Los Angeles, Cal.... 10.00
Ralph F. Mocine, 616 Bdwy., Central
Bldg., Los Angeles, Cal..... 25.11
Program Pub. Co., 304 Mer. Trust Bldg.,
Los Angeles, Cal..... 24.00
Pasadena News Co., Pasadena, Cal..... 13.50
Pomona Progress, Pomona, Cal..... 7.92
Los Angeles Record, Los Angeles, Cal... 116.80
Read Advertising Agency, 120½ S.
Broadway, Los Angeles..... 76.50

Value of Securities.

Dollars Cents.

The Tribune, Los Angeles, Cal.....	174.38
So. Cal. Trolley, Los Angeles, Cal.....	16.30
The Independent, Santa Barbara, Cal...	27.50
The following accounts for supplies:	
L. A. Rubber Stamp Co., 131 S. Spring, Los Angeles.....	4.25
Neuner Company, Los Angeles, Cal.....	22.55
Pioneer Paper Co., 247 S. Los Angeles St., Los Angeles, Cal.....	2.70
H. J. Pauly Co., 214 New High St., Los Angeles.....	3.80
Reeves Printing Co., 432 S. Main, Los Angeles.....	5.00
Ēlysian Spring Water, Valentine & Baxter Sts., Los Angeles.....	6.30
[79]	
Cunningham, Curtis & Welch, 3d & Spring, Los Angeles.....	24.50
Financial Press, New York City.....	3.25
J. H. Adams Co., rent, 111 W. 4th St., Los Angeles.....	500.00
Brown Bros., insurance, 402 L. A. Trust Bldg., Los Angeles.....	14.00
L. A. County Horticultural Com'n. ser- vices, Los Angeles, Cal.....	1.55
Swinnerton Bros., plumbing, 209 N. Bdwy., Los Angeles.....	5.50
Chas. Seyler, Jr., insurance, I. W. Hell- man Bldg., Los Angeles.....	74.25
Merchants & Mfg. Ass'n, Special Fund, Los Angeles, Cal.....	40.00

Value of Securities.

Dollars Cents.

A. L. Jamison, stock sold, evidenced by dishonored check of bankrupt, 305 Security Bldg., Los Angeles.....	3,000.00
A. L. Jamison, 305 Security Bldg., L. A., Balance due on Contract to Buy Stocks.....	1,117.94
Geo. H. Letteau, 305 Security Bldg., L. A.....	2,395.75
Balance due on note of \$32,110.00, dated 3/19/12, due 15 days, interest 18%. All securities closed out and this amount is deficiency.	

Total.... \$ 97,762.28
FIELDING J. STILSON, COMPANY.
By FIELDING J. STILSON,
Pres. Bankrupt.

(4-b)

SCHEDULE A (3) Cont'd.

Forwarded.....	\$ 97,762.28
Babson's Statistical Organization, Inc., Wellsley Hills, Mass.....	75.00
Subscription to monthly financial sheet. [80] Coast Banker Pub. Co., 454 Montgomery St., San Francisco, Ad- vertising.....	50.00
Pacific Wood & Coal Co., 730 W. Pico, Los Angeles, Cal., Supplies.....	85.60
C. C. Desmond, 3rd & Spring, Los An- geles, Cal., Merchandise Orders....	14.50

Value of Securities.

Dollars Cents.

W. P. Jefferies Co., 117 Winston St., Los Angeles, Supplies.....	40.25
Fielding J. Stilson and Carroll A. Stilson, 314 H. W. Hellman Bldg., Los Angeles, Cal., Assignees of W. J. Jerome and Frank M. Byron, being the agreed value on Apr. 22nd, 1912, of 34,000 shares of the Oleum Development Co., held by the Fielding J. Stilson Company for the benefit of said Jerome and Byron, which was sold by the bankrupt and later repurchased and redelivered to said parties by claimants.....	170.00
Los Angeles, California Realty Co., Los Angeles, Cal. Due on purchase price of real property by bankrupt.....	1,300.00
Helen A. Nevin, 634 N. Belmont, Los Angeles, Cal. Money loaned. Evidenced by note dated 7/23/10 due 3 years, interest 6%.....	1,000.00
Sallie F. McClure, 154 W. 21st St., Los Angeles. Money loaned. Evidenced by note dated 10/31/10 due 3 years, interest 6%, principal \$2,700.00, on which \$200.00 has been paid.....	2,500.00
Sallie F. McClure, 154 W. 21st St., Los Angeles. Money loaned. Evidenced by note dated 7/23/10, due 3 years, interest 6%, principal \$2,300.00, on which \$300.00 has been paid.....	2,000.00

Value of Securities.

Dollars Cents.

Mrs. Fielding Johnson, 1048 Kensington Road, Los Angeles. Money loaned. Evidenced by note dated 5/8/07, due 1 year, interest 6%, principal of note \$1,900.00..... 2,526.42

[81]

Gustav Gardthausen, 1044 Kensington Road, Los Angeles. Money loaned. Evidenced by note dated 3/27/11, due 1 year, interest 5%..... 200.00

Gustav Gardthausen, 1044 Kensington Road, Los Angeles. Money loaned. Evidenced by note dated 9/19/11, due 1 year, interest 5%..... 75.00

Henry M. Newmark, c/o Loeb & Loeb, Attys., Los Angeles. Money to buy bonds. Evidenced by note dated 4/9/12, payable 1 year, interest 7%..... 3,097.50

Edith C. Lacey, Address unknown. Stocks sold. Evidenced by note dated 4/12/12, interest 7% due, date unknown..... 160.00

M. T. Kemmerer, 1465 E. 23rd St., Los Angeles. Stocks sold. Evidenced by note dated 4/16/12, due 6 months, interest 6%..... 651.30

Commercial Nat'l Bank, Los Angeles, California. Money loaned Feilding J. Stilson, but used by Company. Evidenced by note dated 4/10/11, payable 1 day, interest 7%..... 2,000.00

Value of Securities.

Dollars Cents.

Geo. A. Tweedy, Bradbury Mines, Rosario, Sonora, Mexico. Money due on rental of a house. Evidenced by note dated April —, 1912, due 6 months, int. 7%	52.90
Ellen F. Nutting, Deceased, estate. Emma L. Warner, Executrix, c/o Willard Butler, Attorney, Trust & Savings Bldg., Los Angeles. Evidenced by note dated 1/8/10 due two years, int. 7%. Money loaned.	2,000.00

 \$115,760.75

FIELDING J. STILSON COMPANY,

By FIELDING J. STILSON. [82]

SCHEDULE A (3) Cont'd.

Forwarded. \$115,760.75

Stilson Bros., 314 H. W. Hellman Bldg., Los Angeles. Cash advanced to various customers of the bankrupt, for small accounts, payments of interest on Gold Notes of Los Angeles, California, Realty Co., etc.	609.03
Alfred K. Care, c/o Cudahy Pkg. Co., Los Angeles. Account three shares American Trust & Svgs. Bank stock sold at \$105.00 per share.	315.00
Shaw Bros., 335 Bush St., San Francisco, Cal. Balance due account stocks sold by Shaw Bros., on margin for the account of bankrupt, which were	

Value of Securities.

Dollars Cents.

afterwards bought in at a loss of \$75.00, of which Shaw Bros. agreed to stand half. Bankrupt owed Shaw Bros. \$56.05 on open account, on other transactions, which, less the half of the \$75.00 loss, leaves a balance of \$18.55 due Shaw Bros.....	18.55
Daniel Shields, 4611 Wall St., Los Angeles, Cal. Account contract to pay street work on Lot 9, Block 27, Angeleno Heights Tract.....	109.55
Marie Uranie Pelton, Los Angeles, Cal. Account contract to pay street work on Lot 5, Block 28½, Angeleno Heights Tract.....	113.24
Gurney E. Newlin, 718 Title Ins. Bldg., Los Angeles, Legal services rendered to bankrupt.....	250.00
W. H. Anderson, 326 Stimson Bldg., Los Angeles, Cal. Legal services rendered. Amount unknown to bankrupt.....	

\$117,176.12

FIELDING J. STILSON COMPANY,

By FIELDING J. STILSON,

Pres. Bankrupt. [83]

SCHEDULE A (4).

LIABILITIES ON NOTES OR BILLS DISCOUNTED WHICH OUGHT TO BE PAID BY THE DRAWERS, MAKERS, ACCEPTORS OR INDORSERS.

N. B.—The dates of the notes or bills, and when due, with the names, residences, and the business or occupation of the drawers, makers or acceptors thereof, are to be set forth under the names of the holders. If the names of the holders are not known, the name of the last holder known to the debtor shall be stated, and his business and place of residence. The same particulars as to notes or bills, on which the debtor is liable as indorser.

Reference to ledger or Voucher.—Names of holders so far as known.—Residence (if unknown, that fact to be stated). Place where contracted.—Nature of liability, and whether contracted as partner or joint contractor with any other person; and if so, with whom.

Dollars Cents.

NONE.

Total.

FIELDING J. STILSON COMPANY.

By FIELDING J. STILSON,

Pres. Bankrupt. [84]

SCHEDULE A (5).

ACCOMMODATION PAPER.

N. B.—The dates of the notes or bills, and when due, with the names and residences of the drawers, makers and acceptors thereof, are to be set forth

under the names of the holders; if the bankrupt be liable as a drawer, maker, acceptor or indorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence. Same particulars as to other commercial paper.

Reference to Ledger or Voucher.—Name of holders.—Residence (if unknown, that fact must be stated). Names and residences of persons accommodated.—Place where contracted.—Whether liability was contracted as partner or joint contractor, or with any other person; and if so, with whom.

Gold Notes of the Los Angeles, California Realty Co.,
as follows:

Value of Securities.	Dollars. Cents.
George W. Adams, 123 N. San Pedro, Los Angeles, Cal.....	200.00
R. F. Byrne, Anaheim, Cal., 2 notes....	200.00
James Backhouse, 712 Waterloo St., Los Angeles, Cal.....	200.00
Thos. F. Bixby, 200 W. Jefferson, Los An- geles, Cal.....	1,000.00
Joseph Braun, % Moose Club, Portland, Ore.....	200.00
Marie Bruns, 850 E. 25th, Los Angeles, Cal.....	1,500.00
Mrs. Mable Church, 860 Lake St., Los An- geles, Cal.....	200.00
Lambert L. Doty, 1041 Wall St., Los An- geles, Cal.....	200.00
Mrs. Sarah W. Ellis, 1811 S. State St., Syracuse, N. Y.....	2,500.00

Value of Securities.

Dollars. Cents.

3 notes of \$500.00 each, and 1 note of
\$1,000.00.

George A. Hess, 1314 Alhambra Road,
Alhambra, Cal..... 1,000.00

[85]

John Helme, 1355 Union Ave., Los An-
geles, Cal..... 400.00

F. L. Jackson, 525 California St., Los An-
geles, Cal..... 100.00

Minnie Irvine, 1317 SeLong St., Los An-
geles, Cal..... 200.00

J. M. Kransneck, 422 E. Anaheim, Long
Beach, Cal..... 2,000.00

P. MacKuehnrick, L. A. Trust & Savings
Bldg., Los Angeles..... 1,000.00

J. E. Little, 1114 Pleasant View Ave.,
Los Angeles..... 100.00

F. J. Nunnelly, 208 W. 6th St., Pomona,
Cal..... 500.00

Lorenzo R. Peebles, W. Ave. 57, Los An-
geles, Cal..... 3,000.00

Emma D. E. Stokley, 1227 W. 8th St.,
Los Angeles, Cal..... 100.00

Ole B. Sjoborg, 806 New York St.,
Long Beach, Cal..... 400.00

Marie Thornton, 1227 Elysian Park
Drive, Los Angeles..... 300.00

Total, 15,300.00

FIELDING J. STILSON COMPANY.

By FIELDING J. STILSON,

Bankrupt.

OATH TO SCHEDULE "A."

United States of America,
Southern District of California,—ss.

On this 25th day of November, A. D. 1912, before me, personally came Fielding J. Stilson, President of Fielding J. Stilson Company, the corporation mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all its debts, in accordance with the Acts of Congress relating to bankruptcy, to the best of his knowledge, information and belief.

[Seal]

M. LUCILE ADAMS,

Notary Public in and for the County of Los Angeles,
State of California.

My Commission Expires July 8, 1914. [86]

**Schedule "B"—Statement of All Property of
Bankrupt [In re Stilson, Bankrupt].**

SCHEDULE "B" (1).

REAL ESTATE.

Location and description of all real estate owned by debtor, or held by him. Incumbrances thereon, if any, and dates thereof. Statement of particulars relating thereto.

Dollars. Cents.

The following real property, all situate in Angeleno Heights Tract, in the County of Los Angeles, State of California, as per map recorded in Book 10, pages 63 et seq., Miscellaneous Records of said

County. (The value given here is that fixed by Messrs. W. W. Mines, Marshall Stimson and Robt. Marsh, all of Los Angeles, California.)

Lot 17, Block 9, subject to mortgage to Citizens' National Bank, together with other property	1,350.00
Lot 7, Block 10, subject to mortgage to Citizens' National Bank, together with other property	1,125.00
Lots 2, 3, 6 and 7, Block 11, subject to mortgage to Citizens' National Bank, together with other property.....	4,050.00
Lots 4 and 5, Block 13, subject to mortgage to Citizens' National Bank, together with other property.....	1,350.00
Lots 35 to 39, 41, 43 to 47, 49, 51 to 54, 57, 59, and 61 to 64, Block 14.....	24,255.00

Lot 64 subject to mortgage to Florence Johnson.

Lots 35, 37, 45, 51, 53 and 59 subject to mortgage to Pacific Mutual, together with other property.

Lots 61, 62 and 63 subject to mortgage to N. E. Cramer.

Lot 63 subject to mortgage to Merchants' National Bank, together with other property.

Lots 38, 44, 46, 52 and 54 subject to a mortgage to Citizens' National Bank, together with other property.

Lots 39, 41, 47, 49, 55 and 57 subject to

Dollars Cents.

mortgage to Chas. M. Stimson. [87]	
Lots 1, 6, 8, 10, 12, 17 to 20, 25 and 26 Block 14 $\frac{1}{2}$, subject to mortgage to Citizens' National Bank.....	9,855.00
Lots 1 to 4, 19, 21, 27, 29 and 45, Block 15, subject to mortgage to Pacific Mutual.. .. .	18,000.00
Lots 53, 55, 61, 66 to 69, and 84, Block 15 $\frac{1}{2}$	14,400.00
Lot 84 subject to mortgage to Florence Johnson.	
Lots 53 and 55 subject to mortgage to Pacific Mutual.	
Lots 66, 67, 68 and 69, subject to mort- gage to Security Savings Bank, together with other property.	
Lots 8, 10, 12, 14, 16, 18, 20, 26, 28, 34, 36 and 43, in Block 16	15,300.00
All except Lots 26 and 28 subject to mortgage to Pacific Mutual.	
Lots 8, 10, 12, 39 and 48. Block 17.....	11,475.00
Lots 8, 10, 12 and 39, subject to mort- gage to Florence Johnson.	
Lot 48 subject to mortgage to Mer- chants' National Bank.	
Lots 26, 32 and 34, Block 18, subject to Mortgage to Pacific Mutual.....	5,670.00
Lots 16 and 17, Block 19.....	900.00
Lot 5, Block 20, subject to mortgage to J. S. Chapman.....	1,800.00
Lots 1 and 2, Block 22, subject to Mort-	

	Dollars	Cents.
gage to Security Savings Bank, together with other property.....	5,850	.00
Lots 1 and 16, Block 25, subject to mortgage to J. S. Chapman.....	5,850	.00
Lots 1, 3, Block 27.....	6,525	.00
Lots 3, 5 and 7 subject to mortgage to Pacific Mutual.		
Lots 45, 47, 53, 55, 65, 67, 69 and 70, Block 28.....	15,795	.00
Lots 65, 67, 69 and 70 subject to mortgage to Pacific Mutual. Lots 45 and 47 subject to mortgage to M. M. Fisher.		
Lot 6, Block 28 $\frac{1}{2}$	4,500	.00
Subject to mortgages to Merchants' National Bank and N. E. Cramer. [88]		
Lots 3, 6, 8, 18, 20, 26 and 27, Block 29....	8,010	.00
Lots 3 and 27 subject to mortgage to J. S. Chapman,		
Lots 8, 10, 20, 24 and 25, Block 30.....	8,100	.00
Lots 8, 10, 12, 14 and 16 subject to mortgage to Pacific Mutual.		
Total.....	164,160	.00

FIELDING J. STILSON COMPANY.

By FIELDING J. STILSON,

Pres. Bankrupt. [89]

SCHEDULE B (1), CONTINUED.

Forwarded \$164,160.00

Dollars Cents.

Lots 11, 17, 25, 27, 29, 31, 33, 35, 37, 46,

47, 52, 54, 56, 60 and 61, Block 31 . . . \$ 25,200.00

Lot 17 subject to Mortgage to Florence
Ingraham.

Lots 25, 27, 31, 33, 35, 37 and 46, 47 and
52 subject to Mortgage to Pacific Mutual.

Lot 11 subject to mortgage to M. M.
Fisher.

Lot 19, Block 31, subject to mortgage to

Sallie F. McClure 2,160.00

The following property, known as 540-
550 San Julian Street, located in the City
of Los Angeles, County of Los Angeles,
State of California, as per map recorded
in Book, page, Records of
of said County:

Beginning at the Easterly line of San
Julian Street; in the City of Los An-
geles, County of Los Angeles, State
of California, at the intersection of
said line with the northerly line of
the property now, or formerly,
owned by John McIlmoil; thence
Northerly along said line of San
Julian Street forty (40) feet; thence
South, fifty-five degrees (55°) and

thirty-four minutes (34') East, parallel with said northerly line of the property of McIlmoil, one hundred ten and one-half ($110\frac{1}{2}$) feet more or less, to the Westerly line of the property now, or formerly, owned by Elizabeth Morton Scott; thence South, thirty-one degrees (31°) West along said line forty (40) feet, more or less, to said Northerly line of McIlmoil; thence North fifty-five degrees (55°) and thirty-four minutes (34') West, along said line one hundred and nine (109) feet, more or less, to the beginning. Also,

Beginning on the Easterly line of San Julian Street, distant forty (40) feet Northerly from the intersection of [90] said line with the Northerly line of the property now, or formerly, owned by John McIlmoil; thence Easterly, parallel with the said Northerly line of McIlmoil one hundred ten and one-half ($110\frac{1}{2}$) feet, more or less, to the property now or formerly owned by Elizabeth Morton Scott; thence North thirty-one degrees (31°) East, forty-three (43) feet, more or less, to the Northeast corner of the tract of land formerly owned by Nicholas Chronis; thence

Dollars Cents.

North fifty-eight degrees (58°) West,
one hundred and twelve (112) feet;
more or less, to the Easterly line of
San Julian Street; thence Southerly
along said line thirty-nine and
twenty-hundredths (39.20) feet,
more or less, to beginning..... 36,000.00

Subject to mortgage to S. F. Keller,
\$10,000.00, to Trust Deed to Merchants
National Bank, together with other prop-
erty, and subject to Grant Deed, as secu-
rity, to Geo. H. Letteau.

Total... ..\$227,520.00

NOTE: Lots 25, 27, 29 and 31, Block 31; Lot 6,
Block 28½; Lot between #1 and #2, Block 27; Lots
17 and 19, Block 31; Lots 63 to 69 Inc., Block 28, and
Lots 45 and 47, Block 28, Angeleno Heights Tract,
subject to Billboard Leases, which expire 5/1/13.

FIELDING J. STILSON COMPANY.

By FIELDING J. STILSON,

Pres. Bankrupt. [91]

SCHEDULE B (2).

PERSONAL PROPERTY.

Dollars Cents.

A. Cash on handNone.

B. Bills of Exchange promissory notes,
or securities of any description
(each to be set out separately).

R. L. Anderson, I. W. Hellman
Bldg., 2000 Cal. Hills Stock held..

52.00

	Dollars	Cents.
Chas. Daniels, 1162 E. 52nd, L. A., 6,000 Oleum Dev. Co. held.....	481.	82
M. & Wm. B. Herriott, W. 21st St., L. A., Notes held.....	151.	25
Wm. Miller, % M. A. Newmark & Co., L. A., 40 Union Oil Stock held.. .. .	1,095.	14
Mrs. C. C. Redmond, S. Hope, L. A., 6000 Oleum Dev. Co. held.....	485.	98
Elizabeth A. Worth, 5000 Ditto.....	112.	50
E. J. Young, Laughlin Bldg., L. A., 500 Rescue Eula Stock held.....	46.	50
Mary E. Stilson, Los Angeles, Cal., open account.... .	13,403.	01
F. J. Stilson, Los Angeles, Cal., open account... ..	17,494.	34
F. N. Coffin, note held.....	480.	00
C. Stock in trade in business of		
at of the value of.....		None
D. Household goods and furniture, household stores, wearing apparel and ornaments of the person, viz:..		None
Total.....	23,802.	54

FIELDING J. STILSON COMPANY.

By FIELDING J. STILSON,

Pres. Bankrupt. [92]

SCHEDULE B (2) CONTINUED.
PERSONAL PROPERTY.

	Dollars	Cents
E. Books, prints and pictures, viz.....	None.	
F. Horses, cows, sheep and other animals (with number of each), viz.	None.	
G. Carriage and other vehicles, viz.....	None.	
H. Farming stock and implements of husbandry, viz.....	None.	
Total		

FIELDING J. STILSON COMPANY.

By FIELDING J. STILSON,

Pres. Bankrupt. [93]

SCHEDULE B (2) CONTINUED.
PERSONAL PROPERTY.

	Dollars	Cents
I. Shipping and shares in vessels, viz...	None.	
K. Machinery, fixtures, apparatus and tools used in business, with the place where each is situated, viz.: Office furniture and fixtures, located at 314 H. W. Hellman Bldg., and also stored in vacant room in H. W. Hellman Bldg., of the value of	1,185.	63
L. Patents, copyrights and trade marks, viz.:.....	None.	
M. Goods or personal property of any other description, with the place where each is situated, viz.: Hibernian Savings Bank, Los Angeles, California.. ..	933.	88

Dollars Cents

Bankrupt owed these people \$10,050.00, and had hypothecated as security therefor the following stocks and bonds:

30 Union Oil Co. 14 Central Nat'l. Bank.

Cal. Pac. R. R. Bonds, \$2,000.00.

L. A. Gas & Electric Co. Bonds, \$3,000.00.

These were sold out by the bank, which together with coupons and dividends, amounted to \$11,296.87. The principal of the notes and interest owing them amounted to \$10,362.99, leaving above balance due the bankrupt.

Seat on Stock Exchange..... 1,500.00

Bankrupt informed this sold by Geo. Letteau and A. H. Woolacott.

Total..... 3,619.51

FIELDING J. STILSON COMPANY.

By FIELDING J. STILSON,

Pres. Bankrupt. [94]

SCHEDULE B (3).

CHOSSES IN ACTION.

Dollars Cents

A. Debts due petitioner on open account

Oleum Development Co. Money advanced..... 11,040.50

Lillian Bailey, address unknown.

Rent due 80.00

Dollars. Cents

J. W. Palmer, San Fernando, Bldg., L. A.....	15.00
Mrs. C. C. Redmond, S. Hope St., L. A. Money advanced.....	96.00
M. Stevens, address unknown. Rent due.....	117.00
A. W. Spurgeon, San Julian St., City. Rents due.....	68.00
This account reduced from \$174.00 by Stilson Bros., who hold the money. This account offset by accounts paid	
Wm. C. Taylor, address unknown...	14.25
L. A. California Realty Co., 314 H. W. Hellman Bldg. Money advanced	2,375.69
W F. Palmer, San Fernando Bldg., L. A. Marginal Stock Transac- tion.....	142.50

B. Stock in incorporated companies,
interest in joint stock companies,
and negotiable bonds.

See page 11-a.

C. Policies of insurance.

Insurance on office furniture, Ger- man American Alliance Policy, expires Nov. 28th, 1912, premium not paid,.....	500.00
--	--------

Security Trust & Savings Bank and
Scott Fremont Keller also hold
policies on San Julian Street
property.

	Dollars	Cents
D. Unliquidated Claims of every nature with their estimated value.		
E. Deposits of money in banking institutions and elsewhere.		
*Commercial National Bank, Los Angeles, Cal.....	5.00	
First National Bank, Los Angeles, Cal.. ..	4.64	
Merchants National Bank, Los Angeles, Cal.....	1.79	
*Understand this amount charged off and credited on interest due on note of F. J. Stilson.		

Total 14,460.46

FIELDING J. STILSON COMPANY
BY FIELDING J. STILSON,
Pres. Bankrupt. [95]

SCHEDULE B (3), CONTINUED

B. Stocks and Bonds.	Dollars	Cents.
The value placed upon these stocks and bonds is of the market value Apr. 22d, 1912.		
15 Shares San Diego Home.....	\$100.00	
Hypothecated to M. D. Spaulding...	750.00	
1 Share Home Telephone, Pfd.....	30.00	
1 " L. A. Bond & Mortgage Co.		
140 Amalgamated Oil Co.....	8,400.00	
F. J. Stilson Co. purchased 200 Amalgamated Oil @ 64½ from Wm. R. Staats Co. The check in pay-		

Dollars Cents

ment was dishonored. The Staats Co. delivered 60 shares and gave bankrupt a due bill for balance of 140 shares, valued at \$8,400.00. The bankrupt then borrowed money from A. L. Jameson, giving as security the 60 shares of Amalgamated Oil and the due bill of the Staats Co. for 140 shares. The 60 shares were sold. 210,000 Oleum Developement Co.

80,000 shares hypothecated to A. L. Jameson, \$10,145.00.

50,000 shares hypothecated to Richard B. Kirchhoffer, \$1,050.00.

50,000 shares hypothecated to A. H. Woolacott, \$1, 125.00

30,000 shares hypothecated to John C. Rupp, \$1,050.00.

80 University Club Holding Co..... 800.00

Hypothecated to M. D. Spalding, \$750.00.

10 Santa Monica Bay Home Tel. Co. 50.00

\$100 L. A. Country Club Bond..... 100.00

70 Johnnie Mining & Milling Co. ... 5.60

500 Bonnie Claire Mining Co..... 10.00

.. 1,000 McKittrick Investors Oil Co.

3,000 Goldfields Eureka Co.

6,000 Cleveland Oil Co.

6,000 Midway Union Oil Co.

	Dollars	Cents
\$3,500 Riverside Home Tgh. Co.		
Bonds 7.	1,400	00
Hypothecated to Security Trust & Svgs. Bank, \$1,250.00.		
	\$10,895	60

FIELDING J. STILSON COMPANY
BY FIELDING J. STILSON,
Pres. Bankrupt. [96]

SCHEDULE B (4)

PROPERTY IN REVERSION, REMAINDER
OR EXPECTANCY, INCLUDING PROP-
ERTY HELD IN TRUST FOR THE
DEBTOR OR SUBJECT TO ANY POWER
OR RIGHT TO DISPOSE OF OR TO
CHARGE.

N. B. —A particular description of each interest
must be entered. If all, or any of the debtor's
property has conveyed by deed of assignment or
otherwise, for the benefit of creditors, the date of
such should be stated, the name and address of the
person to whom the property was conveyed, the
amount realized from the proceeds thereof, and the
disposal of the same, as far as known to the debtor.

General Interest.	Particular Description.	Supposed Value of My Interest. Dollars Cents.
Interest in land.	NONE	
Personal property.		NONE.
Property in money, stocks, shares, bonds annuities, etc.		

NONE

Rights and powers, legacies and bequests.

NONE

Total———

Property heretofore conveyed for the benefit of creditors.

Amount Realized
from Proceeds of
Property Conveyed.

What portion of debtor's property has been conveyed by deed of assignment, or otherwise for the benefit of creditors; date of such deed, name and address of party to whom conveyed; amount realized therefrom, and disposal of same, so far as known to debtor.

What sum or sums have been paid to counsel, and to whom for services rendered or to be rendered in this bankruptcy.

NONE

All property and assets of bankrupt assigned over to Carroll Allen and Willis H. Booth, for the benefit of all creditors, on April 22d, 1912.

Total

FIELDING J. STILSON COMPANY.

By FIELDING J. STILSON,

Pres. Bankrupt.

SCHEDULE B (5).

A particular statement of the Property claimed as Exempted from the Acts of Congress relating to Bankruptcy, giving each item of Property and its valuation; and if any portion of it is Real Estate, its location, description and present use.

Dollars Cents

Military uniforms, arms and equipments.

Military uniforms, arms and equipments. None.

Property claimed to be exempted by State laws; its valuation; whether real or personal; its description and present use; and reference given to the statute of the State creating the exemption.

None.

FIELDING J. STILSON COMPANY.

By FIELDING J. STILSON,

Pres. Bankrupt. [98]

SCHEDULE B (6).

BOOKS, PAPERS, DEEDS AND WRITINGS
RELATING TO BANKRUPT'S BUSINESS
AND ESTATE.

The following is a true list of all books, papers, deeds and writings relating to my trade, business dealings, estate and effects, or any part thereof, which at the date of this petition, are in my possession, or under my custody and control, or which are in the possession or custody of any person in trust for me, or for my use, benefit or advantage; and also of all others which have been heretofore, at any time, in my possession or under my custody or control, and which are now held by the parties whose names

are hereinafter set forth, with the reason for their custody of the same.

Dollars Cents

Books.

314 H. W. Hellman Bldg., Los Angeles, Cal.

Deeds.

314 H. W. Hellman Bldg., Los Angeles, Cal.

Papers.

314 H. W. Hellman Bldg., Los Angeles, Cal.

FIELDING J. STILSON, COMPANY.

By FIELDING J. STILSON,

Pres. Bankrupt.

OATH TO SCHEDULE B.

United States of America,

Southern District of California,—ss.

On this 25th day of November, A. D. 1912, before me, personally came Fielding J. Stilson, President of Fielding J. Stilson Company, the corporation mentioned in and who subscribed to the foregoing schedule and who, being by me [99] first duly sworn, did declare the said Schedule to be a statement of all its estate, both real and personal, in accordance with the Acts of Congress relating to Bankruptcy.

[Seal]

M. LUCILE ADAMS,

Notary Public in and for the County of Los Angeles,
State of California.

My Commission Expires July 8, 1914.

[Endorsed]: No. 1045. United States District Court, Southern District of California, Southern Division. In the Matter of Fielding J. Stilson Company, Bankrupt. Petition by Debtor with Sched-

ules "A" and "B." (Schedules must be filed in Triplicate.) Filed Nov. 27, 1912, at 5 min. past 3 o'clock P. M. Wm. M. Van Dyke, Clerk. Virgil W. Owen, Deputy. Carroll Allen, 1027 Title Ins. Bldg., Attorney for Bankrupt. [100]

*In the District Court of the United States, Southern
District of California, Southern Division.*

No. 235—CIVIL, S. D.

SECURITY TRUST & SAVINGS BANK, TRUS-
TEE, ETC.,

Complainant,

vs.

WM. R. STAATS COMPANY, et al.,

Defendants.

Transcript of Testimony.

On hearing before Hon. LYNN HELM, Special Master, at his office, 918 Title Insurance Building, Los Angeles, California, April 23d, 27th and 28th, 1915.

Filed May 21, 1915 at — min. past 2 o'clock P. M.

LYNN HELM, Referee.

C. MEADE, Clerk.

WILLIAM T. CRAIG, Esq., Counsel for Com-
plainant.

Messrs. O'MELVENY, STEVENS & MILLI-
KIN and WALTER K. TULLER, Counsel
for Defendant Wm. R. Staats Co.

ELIZA P. HOUGHTON, Court Reporter and
Notary Public. 836 Title Insurance Build-
ing, Los Angeles, Cal.

Filed June 18, 1915. Wm. M. Van Dyke, Clerk.
By Leslie S. Colyer, Deputy. [101]

*In the District Court of the United States, Southern
District of California, Southern Division.*

No. 235—CIVIL, S. D.

SECURITY TRUST & SAVINGS BANK, TRUS-
TEE, etc.,

Complainant,

vs.

WM. R. STAATS COMPANY, et al.,

Defendants.

Appearances:

WILLIAM T. CRAIG, Esq., of Counsel for
Complainant.

O'MELVENY, STEVENS & MILLIKIN and
WALTER K. TULLER, Counsel for De-
fendant Wm. R. Staats Co.

TRANSCRIPT OF TESTIMONY.

On hearing before Hon. LYNN HELM, Special
Master, at his office, 918 Title Insurance Building,
Los Angeles, California, on the 23d day of April,
1915, at 10:30 o'clock A. M. [102]

**[Proceedings Had Before Special Master on April
23, 1915.]**

Mr. CRAIG.—I will call Mr. Fielding J. Stilson.

Mr. TULLER.—Before any testimony is taken I
should like to make a general objection to the bill of
complaint on the ground that it does not state facts
sufficient to constitute a cause of action, therefore
object to the taking of any testimony.

The SPECIAL MASTER.—Objection overruled.

Mr. CRAIG.—Before proceeding with the testimony of Mr. Stilson, I desire to offer in evidence the petition in bankruptcy in this matter, together with the report of the Special Master and the order confirming the report of the Special Master and the order of adjudication.

Mr. TULLER.—To which the defendant objects on the ground that it is incompetent, and relates to a time subsequent to the time in which it is alleged in the bill of complaint that the deed of trust here sought to be set aside was executed; the motion was that on said time, to wit, the 19th day of March, 1912, the Fielding J. Stilson Company was insolvent. I have a number of authorities on that subject if your honor cares to hear me on that.

The SPECIAL MASTER.—Your idea is that the insolvency or the adjudication of insolvency at the date of the filing of the petition has no bearing upon the question of insolvency at the time of the giving of the trust deed?

Mr. TULLER.—Yes, sir. I believe that is the law established by the authorities.

Mr. CRAIG.—I am not offering the testimony for the purpose of proving that at the date this deed was obtained the corporation was insolvent. I shall follow the fact that a preference was alleged.

Mr. TULLER.—We further object that there should be a further specification, that the petition is not in any sense binding upon this defendant. [103]

The SPECIAL MASTER.—I understand. This Circuit Court of Appeals is binding upon this Court.

Mr. TULLER.—I want to preserve my objection.

The SPECIAL MASTER.—The objection will be overruled and the testimony will be received. You have a right to reserve the matter for final argument.

Mr. CRAIG.—I said it was not for the purpose of proving insolvency at that time, but I don't mean to say that it was not offered for the purpose of binding the respondent here, because one of the acts of bankruptcy alleged in the petition was this very preference.

Mr. TULLER.—May it be understood that whenever an objection is overruled that an exception will be made?

The SPECIAL MASTER.—But you will have to make your objection.

Mr. TULLER.—Yes. Do I understand that you offer each and all of the papers in this bankruptcy?

Mr. CRAIG.—These are the ones.

Mr. TULLER.—There were three different petitions. All of them will be offered?

Mr. CRAIG.—Yes.

The SPECIAL MASTER.—The order of adjudication is of record.

Mr. CRAIG.—Yes and also the order confirming the Master's report.

Mr. TULLER.—The offer, then, amounts to all of the papers leading up to the adjudication in bankruptcy?

Mr. CRAIG.—Yes, sir.

[Testimony of Fielding J. Stilson, for Plaintiff.]

FIELDING J. STILSON, a witness produced on behalf of complainant, being first duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows: [104]

Direct Examination.

(By Mr. CRAIG.)

Q. What is your name?

A. Fielding J. Stilson.

Q. Were you connected with the Fielding J. Stilson Company in the year 1912? A. I was.

Q. In what capacity?

A. Superintendent and general manager.

Q. Were you such at the date of the petition adjudication (in pencil) in bankruptcy of October 24th, 1912? A. I was.

Q. And how long prior thereto had you been such officer?

A. Since the incorporation of the company.

Q. When was that?

A. 1903, I believe, or 1904. I am not certain of that date.

Q. The schedules in bankruptcy in this matter, Mr. Stilson, were executed by you?

Mr. TULLER.—I do not understand by what right the witness examines these schedules now unless they are offered in evidence.

Mr. CRAIG.—I do not intend to offer all of them. I shall call attention to certain parts of them.

The SPECIAL MASTER.—Answer the question, yes or no.

(Testimony of Fielding J. Stilson.)

A. It was the schedule signed by myself.

Q. Will you examine the schedules and state the amount of the liabilities of the Fielding J. Stilson Company at the date of their filing on November 27th, 1912?

Mr. TULLER.—I object to the witness examining the schedules, first that it is incompetent, second, that it is not a memorandum made by the witness at the time it occurred; he therefore has no right to examine them for the purpose of his recollection. [105]

The SPECIAL MASTER.—Objection sustained.

Q. What were the liabilities of the Fielding J. Stilson Company at the time you filed this petition in bankruptcy?

Mr. TULLER.—Objected to on the ground that it relates to a time many months subsequent to the time, March 20th, 1912.

The SPECIAL MASTER.—Objection overruled.

A. Couldn't answer without an examination of the schedules.

Q. The schedules you have just testified to about? Will you examine the schedules—

Mr. TULLER.—Just a moment, I make the same objection to that as already made heretofore to the schedules; further that it is not a book of original entry.

Q. Do the schedules correctly state your liabilities at the time they were filed?

Mr. TULLER.—Objected to as a conclusion of the witness and on the grounds already stated.

The SPECIAL MASTER.—Objection overruled.

(Testimony of Fielding J. Stilson.)

A. They did to the best of my knowledge and belief.

Q. I will now ask the witness to testify as to the amount of the liabilities on that date?

Mr. TULLER.—Same objection.

The SPECIAL MASTER.—Objection sustained. I don't know why he should look at them.

Mr. CRAIG.—I am not going to offer the schedules. I do not propose to be bound by the schedules. I will offer the schedules so far as they relate to the liabilities of the corporation.

Mr. TULLER.—Object to them as incompetent and not the books of original entry.

The SPECIAL MASTER.—The schedules, I think, are admissible in evidence.

Mr. TULLER.—We will object to the offer of any portion of them. [106]

The SPECIAL MASTER.—But I don't think that they are conclusive on anybody.

Mr. CRAIG.—That is true, but the trustee in this case does not propose to be bound by valuations of properties which are included in these schedules as showing assets, because the valuation of the bankrupt was so out of proportion that the trustee does not propose to be bound by them.

The SPECIAL MASTER.—I don't suppose the trustee will be bound by them. He can always show the fact as to what is the truth. The schedules are admissible in evidence for what they are.

Mr. CRAIG.—I am perfectly willing to offer the schedules in evidence for the purpose of showing that

(Testimony of Fielding J. Stilson.)

the schedule was filed by the bankrupt.

Mr. TULLER.—We will stipulate that they did file the schedules.

Mr. CRAIG.—If counsel wants me to get all of the books and papers of the Fielding J. Stilson Company, we will sit down here for three or four days. The objection is wholly technical because if the liabilities are not true, then I am perfectly willing to go behind the schedules and bring the books and Mr. Palethorpe, the auditor.

The SPECIAL MASTER.—He can testify as to that without going all over the books. You can take his report and tell what they are, his summary is admissible in evidence.

Mr. TULLER.—I have no desire to be technical, but he has already stated that in some instances the schedules are incorrect.

Mr. CRAIG.—I said that the properties are of different values. I think that every statement in these schedules is absolutely correct and true so far as they state facts.

The SPECIAL MASTER. Call your witnesses. You may get Mr. Palethorpe, his report, and prove it.

Mr. TULLER.—I will ask that the witness for the present not [107] be allowed to examine the schedules.

Q. (By the SPECIAL MASTER.) Don't you know what your liabilities were?

A. I could not answer after three years what they were.

Q. (By the SPECIAL MASTER.) Don't you re-

(Testimony of Fielding J. Stilson.)

member what approximately your liabilities were?

A. Yes.

Q. (By the SPECIAL MASTER.)—What were they?

A. As I remember it, in the neighborhood of two hundred and fifty thousand or two hundred sixty thousand dollars. That is only a guess.

Mr. TULLER.—I move to strike out—

The WITNESS.—It may be ten thousand more or ten thousand less.

Mr. CRAIG.—That is approximately?

A. Yes.

The SPECIAL MASTER.—That is all it is. I asked him approximately what it was.

Q. At the time that you filed your schedules, was the Fielding J. Stilson Company engaged in business? A. Yes.

Q. Were they conducting their business at that time?

Q. (By the SPECIAL MASTER.)—At the time the schedules were filed? The schedules were filed after the adjudication in bankruptcy.

Q. At the time the schedules were filed were you engaged in business?

A. The corporation was not.

Q. When did the corporation cease doing business?

Mr. TULLER.—Objected to as incompetent, irrelevant and immaterial.

The SPECIAL MASTER.—Objection overruled.
[108]

A. On or about March the 19th, 1912.

(Testimony of Fielding J. Stilson.)

Q. What was its business?

A. Investments, stocks and bonds.

Q. It had been actively engaged prior to that time for how long?

A. Since the incorporation of the company about 1903 or 4.

Q. About to what extent was its annual business?

Mr. TULLER.—During what time?

Q. Prior to March, 1912, during the year prior to that time?

Mr. TULLER.—The question relates to the total volume of business?

A. Our deposits ran from one hundred to two hundred thousand dollars a month. That varied, of course.

Q. Why did the corporation cease doing business on or about the 19th day of March, 1912?

Mr. TULLER.—Objected to as incompetent, irrelevant and immaterial.

The SPECIAL MASTER.—Objection overruled.

A. Unable to meet its pressing obligations, and a physical break-down on my part.

Q. What became of the assets of the corporation between the 19th day of March and the time of the filing of the petition in bankruptcy?

A. They were deeded to Mr. Carroll Allen and Mr. Willis H. Booth.

Q. As trustee of the corporation? A. Yes.

Mr. TULLER.—May I ask when that deed was made simply to save time?

(Testimony of Fielding J. Stilson.)

Q. (By the SPECIAL MASTER.) Do you know?

Mr. ALLEN.—A little after the middle of March.

The SPECIAL MASTER.—It is here in the Master's report, Mr. Tuller, that the 15th day of March, 1912, the indebtedness of the Stilson Company was two hundred fifty thousand dollars, nearly [109] two hundred sixty thousand dollars.

Mr. TULLER.—I would like to get it.

The SPECIAL MASTER.—The 15th day of March seems to be the day in which things were fixed that the findings relate to.

Q. Was there any change in the assets and liabilities of the Fielding J. Stilson Company, a bankrupt, between the 19th day of March, 1912, and the date of the filing of the schedules in bankruptcy?

Mr. TULLER.—That is objected to as calling for a conclusion of the witness. The reference to what its debts or liabilities were is too vague and indefinite to prove insolvency at that time.

The SPECIAL MASTER.—The question isn't what his liabilities were, but the question is simply was there any change.

Mr. TULLER.—Further, it is a conclusion. There might be a number of question of law as to the change.

The SPECIAL MASTER.—You can start with and follow out the schedules and you can prove that there has been no change during that time.

Mr. TULLER.—I don't deny that that may be done in that manner. I object that this is not the

(Testimony of Fielding J. Stilson.)

proper way. He simply asks a conclusion of the witness.

The SPECIAL MASTER.—The petition in—the date is fixed and the liabilities and the assets at the time of the filing of the petition. The testimony is that they were not in business at all; they didn't transact any business after the 19th day of March.

Mr. CRAIG.—I can't prove everything in a minute. I will follow this up by following this along if counsel will permit.

The SPECIAL MASTER.—I understand, but I don't see why, when [110] a man that is in charge of a business,—suppose this was not a corporation; suppose it was an individual and he was,—ceased business on a certain day, and subsequently, three or six months afterwards filed schedules in bankruptcy, isn't it competent for him to say that things remain just the same between those two dates?

Mr. TULLER.—I think that I can show that the witness was ill during that time, and out of his head, and was not competent to show during that time.

Mr. CRAIG.—That is cross-examination.

Mr. TULLER.—If he was ill and away from the business, it is simply a matter of hearsay. If you will allow me to bring that out, I will; I don't think that counsel will deny that that is a fact.

Mr. CRAIG.—That is purely cross-examination, because this witness knew.

The SPECIAL MASTER.—The testimony will be received and can be stricken out.

Mr. TULLER.—May I ask your Honor to direct

(Testimony of Fielding J. Stilson.)

the witness to state, if he knew?

Q. (By the SPECIAL MASTER.) If you know?

A. I know. There were some slight changes, some rents were paid in, but the main body of assets and liabilities were the same.

Mr. TULLER.—I object to that, the main body.

The SPECIAL MASTER.—It will stand subject to the objection.

Q. What was the amount of those approximately.

Mr. TULLER.—I wish there, your Honor, it seems to me that when there are books and records to show these things we ought not to stand on a conclusion of the witness as to whether this concern was insolvent at that time.

Mr. CRAIG.—This witness knows these things outside af the books. [111]

The SPECIAL MASTER.—You used the word approximately?

Mr. CRAIG.—Yes.

The SPECIAL MASTER.—Why should it be approximately?

Mr. CRAIG.—The assets of this concern is a hundred thousand dollars, and a few thousand dollars makes a very little difference.

The SPECIAL MASTER.—Objection overruled.

A. I should say the rents were in the neighborhood of about a thousand dollars received.

Q. Was that of one or more properties belonging to the company? A. Different properties.

Q. The corporation was not engaged in any business between those two dates? A. It was not.

(Testimony of Fielding J. Stilson.)

Q. You didn't incur any liabilities, that is the corporation didn't incur any liabilities after the 19th day of March?

Mr. TULLER.—Objected to as calling for a conclusion of the witness.

The SPECIAL MASTER.—Objection overruled.

Q. Did it or not? A. Beg pardon?

Q. Did the corporation incur any liabilities after the 19th day of March?

A. Yes, taxes, but no new liabilities in the sense of business liabilities.

Q. Outside of the indebtedness which arose from taxes accruing was there any other liability incurred by the corporation, or did it become liable for any further debt after the 19th day of March?

Mr. TULLER.—Same objection.

The SPECIAL MASTER.—Same ruling.

A. It did not. [112]

Q. Did the corporation increase its assets in any way by the disposal of any properties or income whatsoever after the 19th day of March and up to the time of the filing of the schedules, outside of the rents?

Mr. TULLER.—Same objection.

The SPECIAL MASTER.—Same ruling.

A. It did not.

Mr. CRAIG.—Then, I offer the schedules in bankruptcy for the purpose of proving the amount of the liabilities as shown by the schedules at the time of the filing.

Mr. TULLER.—May I look at those schedules?

(Testimony of Fielding J. Stilson.)

Mr. CRAIG.—I think the summary on that first page is correct?

The SPECIAL MASTER.—It is sometimes not, Mr. Tuller.

Mr. TULLER.—Your Honor, I don't know what the legal effect of those schedules is. It seems to me that it is hardly evidence of anything.

The SPECIAL MASTER.—There are authorities for admitting the schedules as well as the order of adjudication in the matter, and the appraisement. Objection overruled.

Mr. TULLER.—It is understood that the whole schedules are in?

The SPECIAL MASTER.—They are offered.

Mr. TULLER.—I take it they are in for all purposes.

Q. Mr. Stilson, you testified that you made up these schedules yourself? A. I did.

Q. From what were they made? A. What?

Q. From what were they made?

A. The books of the corporation.

Mr. TULLER.—Then, I wish to add a further objection that it appears that it is a document of secondary evidence, and move to strike it out on that ground. [113]

The SPECIAL MASTER.—No, he made them from the other books and it is a summary, and they may be offered in evidence on that ground. You can examine the books, they will be brought here—

Mr. TULLER.—I assumed that you will not change your ruling.

(Testimony of Fielding J. Stilson.)

The SPECIAL MASTER.—It is a summary of the evidence.

Mr. CRAIG.—The objections being made, we are going to bring all the books here; we will have all the books here; to satisfy counsel we will bring the expert accountant here, or we will—

The SPECIAL MASTER.—They can either be brought here or we can adjourn and go across the street. We can go over there to the bank and see them.

Mr. TULLER.—I am certainly not going to stipulate my case away.

The SPECIAL MASTER.—You can go over there and examine them; it will be the same as if they were here. When it is proven, it will be admitted in evidence subject to your cross-examination.

Mr. TULLER.—Do I understand that the books themselves will be considered as offered in evidence?

The SPECIAL MASTER.—No, I don't understand that; when books consist of a great many conflicting accounts and matters, a man who has made an examination of the accounts may make a summary, subject to your right to cross-examine.

Mr. TULLER.—But I don't know that this witness has a right—

The SPECIAL MASTER.—They are going to have Mr. Palethorpe testify, but I won't go to the trouble of bringing all those books here.

Mr. TULLER.—I will go over there. I have no desire to be captious.

The SPECIAL MASTER.—The expert account-

(Testimony of Fielding J. Stilson.)

ant's report is here.

Mr. TULLER.—Mr. Allen just states that the deed to which reference was heretofore made was made on the 15th day of April. May that be considered in? That is the deed from the Fielding J, Stilson Company to Booth and Allen. [114]

The SPECIAL MASTER.—This is a copy of the expert accountant's report which was testified to on the hearing before the Master at the time of the hearing of the special reference on the petition and answers prior to the adjudication.

Mr. TULLER.—May I ask, Mr. Allen, was this statement made from the books?

Mr. ALLEN.—Yes.

Mr. CRAIG.—I think, Mr. Tuller, that from an examination of that report you will be satisfied.

The SPECIAL MASTER.—That is the same one that I acted upon and you may examine it now, because as I assume when Mr. Palethorpe calls here he will testify to its correctness.

Mr. TULLER.—Shall I do it now?

The SPECIAL MASTER.—No, you can take the noon hour.

Q. Mr. Stilson, do these schedules contain a true statement of the various properties held or owned by the Fielding J. Stilson Company at the time of the bankruptcy? A. Do you refer to this paper?

Q. Yes, sir. A. They do.

Q. (By the SPECIAL MASTER.) That is, an accurate list and inventory of the property?

A. They do.

(Testimony of Fielding J. Stilson.)

The SPECIAL MASTER.—Are those properties listed also in the—

Mr. CRAIG.—The expert accountant's report? Yes. Nothing in the schedules that is not in the report except those additional rentals.

The SPECIAL MASTER.—You have then a summary of the information.

Q. Your schedules set out a large number of pieces of real property, all of which were located in the City of Los Angeles, County of Los Angeles, State of California, and I want to know whether every piece of realty which was owned by the corporation was scheduled? [115]

A. It was, to the best of my knowledge and belief.

Mr. TULLER.—I move to strike out the answer as not responsive. It doesn't show that the witness knew of all of the property.

The SPECIAL MASTER.—The motion will be denied; it will stand subject to the motion.

Q. Mr. Stilson, were you familiar with every detail of the assets and liabilities of the Fielding J. Stilson Company?

Mr. TULLER.—That is obviously leading and also calling for a conclusion; object to that upon that ground. I don't—

The SPECIAL MASTER.—Objection overruled. I don't think that as to whether he was familiar was a leading question.

Q. Mr. Stilson, do you know of your own personal knowledge what pieces of property, real property, and what items of personal property the Fielding J.

(Testimony of Fielding J. Stilson.)

Stilson Company owned?

Mr. TULLER.—Same objection.

A. I do.

The SPECIAL MASTER.—Objection overruled.

Q. Among the assets scheduled are a number of bills of exchange or promissory notes found on—in schedule B (2) in the schedules,—do you know the value of those various notes or bills of exchange as it was in March, 1912, and at the time the schedules were filed?

Mr. TULLER.—Object to that as calling for a conclusion of the witness and as incompetent to lay a foundation for expert opinion as to the value.

Mr. CRAIG.—As to whether he knew.

Mr. TULLER.—Conclusion as to whether he knew, an opinion.

The SPECIAL MASTER.—Objection overruled.

Q. Yes or no, do you know the value? A. Yes.

Q. Explain those items and state what the value of each one of them was at that time, and state the reasons why you so state? [116]

Mr. TULLER.—Object to that on the ground that it is incompetent, no foundation laid for opinion evidence; also vague and indefinite in calling for an explanation.

Mr. CRAIG.—It appears that Mr. Fielding J. Stilson appears there as a creditor of this corporation for \$7,000.00 and that he has no credits.

Mr. TULLER.—I insist upon my objection.

The SPECIAL MASTER.—Objection overruled.

Q. As to whether they are bills of exchange or

(Testimony of Fielding J. Stilson.)

promissory notes?

The SPECIAL MASTER.—Objection overruled.

(Question read by reporter.)

A. Do you wish me to go into each item?

Q. Yes, if you please.

A. R. L. Anderson owed \$52,00 to our corporation and we held as collateral 2,000 shares of California Hills stock. My recollection is that the market value of that stock was much less than the loan. This was taken from the books of the corporation, that is, if the man had come in and paid the \$52.00, we would have given him the 2,000 shares.

Q. Mr. Stilson, what I want to get at is, was the note of its face value?

Mr. TULLER.—Same objection. That is leading.

Q. What was the value of the notes, whether or not when you scheduled the \$52.00 as an asset of the corporation, whether it was worth the \$52.00 or not?

Q. (By the SPECIAL MASTER.) What in fact was it worth to take up?

Mr. TULLER.—All my objections go without repeating.

Mr. CRAIG.—It might be put in this way,—I will take the chances of asking objectionable questions and they will go up.

Mr. TULLER.—It will be so stipulated.

The SPECIAL MASTER.—Proceed with each item. [117]

A. The first item of \$52.00 was worth only the value of the market of the California Hills.

(Testimony of Fielding J. Stilson.)

Q. Do you know what that was?

(Figures in pencil on back of page.)

A. I think it was about—

Mr. TULLER.—I object to the witness testifying unless he knows.

Mr. CRAIG.—I am trying to refresh his memory. If you don't remember, go to the next one.

A. Charles Daniels, 6,000 shares of Oleum Development Company, of absolutely no value. The next item, M. and William B. Herriott, notes, absolutely no value.

Q. When you say absolutely no value, do you mean in March, 1912, and has not been since?

A. Yes. William Miller, that 40 Union Oil is an error, it should be 10 shares, \$1,095.00. That was worth the money, was at par about that time. That is a good asset. Mrs. C. C. Redmond, \$485.98, of no value. Elizabeth A. Worth, \$112.50, of no value. E. J. Young, 500 Rescue Eula stock held, \$46.50, probably worth \$20.00. The account of Mary E. Stilson was an open account of \$13,403.01, was of no value because it simply represented money that was advanced to her account in the building of the houses; mine was in the same manner and of \$7,000. F. N. Coffin, of \$480.00, was doubtful.

Q. It might be worth \$480.00?

A. It might be if he would pay it. It is in the hands of the trustee.

Q. When you state that the \$13,403.00 is due as money advanced for building those houses, what do you mean?

(Testimony of Fielding J. Stilson.)

A. It was merely a record of the costs of the houses.

Q. What houses?

A. Her house, 1048 Kensington Road.

Q. That was a house belonging to your mother at the time of the filing of the schedules, no, I mean March 19th, 1912? [118]

A. Yes.

Q. Was that property—did that property belong to the corporation at any time? A. It did not.

Q. Do you remember whether that house and lot belonging to your mother was included in the schedules?

Mr. TULLER.—The schedules speak for themselves.

Mr. CRAIG.—No way in the world of determining that except by examination.

A. No, they are not here.

Mr. CRAIG.—I would state that the property I am inquiring about is lots 34 to 39, inclusive, in Block 15, Angeleno Heights.

Mr. TULLER.—In this city?

Mr. CRAIG.—In this city.

Q. In March, 1912, and after that time and up to the time of the filing of these schedules, did you have any property or means out of which the \$7,000 scheduled there could be made?

Mr. TULLER.—Object to that as a conclusion of the witness. If he wants to ask what his property was—

The SPECIAL MASTER.—Objection sustained

(Testimony of Fielding J. Stilson.)

Q. What property had you, Mr. Stilson, out of which this \$7,000 could be made during that time, I mean from the 19th day of March up to the time of the filing of the schedules? A. I don't know.

Q. (By the SPECIAL MASTER.) Do you mean you don't know of any?

A. Between the 19th day of March, 1912, and up to the date of the deed to Messrs. Carroll Allen and Willis H. Booth, the title to my property was mine, but I had given my word to Mr. Allen shortly after March 19th to deed this property under certain conditions which were afterwards carried out, but I had no way to realize on that within the time given.

[119]

Q. Isn't it a fact that that property was in your wife's name?

A. Yes, and mine; joint name, I think it was. She joined in the deed.

Q. What was the value of the property?

Mr. TULLER.—Object to that on the ground that there is no foundation laid.

Mr. CRAIG.—I will withdraw that objection, I mean I will withdraw the question.

Q. What was the encumbrance upon the property?

A. You refer to my property or my mother's?

Q. No, yours.

A. Covered by two mortgages in the Pacific Mutual, one for thirty thousand dollars and one for ten thousand.

Q. Do you know what encumbrances were on your mother's property?

(Testimony of Fielding J. Stilson.)

A. That was in the blanket mortgage.

Q. That was in the mortgages which you mention as thirty and ten thousand?

Q. (By Mr. TULLER.) These two mortgages covered these properties?

A. Yes, they could not be released.

Q. You scheduled in schedule B (3) choses in action, a claim of the corporation against the Oleum Investment Company for money advanced, \$11,040.-50, was that a collectible obligation?

Mr. TULLER.—Objected to as calling for a conclusion.

Q. Was the Oleum Company a California corporation? A. No, Nevada.

Q. Who was the president?

A. No, president, I was vice-president and manager.

Q. You were vice-president and manager in March, 1912? A. Yes, sir.

Q. Were you familiar with its affairs, assets and liabilities? A. I was. [120]

Q. You lost a good deal of money in that?

A. \$22,000.00.

Mr. TULLER.—Objected to as leading.

The SPECIAL MASTER.—Objection overruled.

Q. Was that claim of \$11,000 due to the Fielding J. Stilson Company collectible, and if so, in what manner?

Mr. TULLER.—Objected to as calling for a conclusion and no foundation laid. I call attention at this time that no unfair advantage may be taken,—

(Testimony of Fielding J. Stilson.)

the question as to whether it is collectible depends upon not only the corporation but whether the stockholders were liable.

Q. What was the value of the indebtedness?

Mr. TULLER.—Objected to as calling for a conclusion, and on the grounds heretofore specified.

Q. Answer the question, if you know?

Q. (By the SPECIAL MASTER.) What was the value of that claim against the Oleum Development Company, that you could sell it for on the market?

A. I believe it had no value at that time.

Mr. TULLER.—What time do you refer to?

Q. You refer to March, 1912? A. Yes.

Q. Did it have any value after that time and down to November?

Mr. TULLER.—Same objection.

The SPECIAL MASTER.—Same ruling.

A. Not so far as the corporation was concerned.

Q. (By the SPECIAL MASTER.) What do you mean by that, not so far as the corporation was concerned?

A. The Fielding J. Stilson Company.

Q. That is, they could not sell it?

A. Couldn't do a thing with it. [121]

Q. (By Mr. TULLER.) You don't mean that the note didn't have any intrinsic value?

A. I know of none, Mr. Tuller.

Q. Will you kindly go through this list, choses in action, debts due petitioner on open account and state what the value was of each of those, if you know, on March 19th, 1912, and at any time subsequent to that time?

(Testimony of Fielding J. Stilson.)

Mr. TULLER.—Objected to on the ground aforesaid, a conclusion of the witness, and no foundation laid.

The SPECIAL MASTER.—Objection overruled.

Mr. TULLER.—Not a proper case for opinion evidence.

The SPECIAL MASTER.—Objection overruled.

A. Lillian Bailey, rent due \$80.00, no value, non-collectible. J. W. Palmer, \$15.00, very uncertain.

Q. Now, Mr. Stilson, I want the value, if no value state it, and if any value state what the value is?

A. Mrs. C. C. Redmond, money advanced, \$96.00, no value; M. Stevens, rent due, that is hall rent due, no value; A. W. Spurgeon, afterwards paid; William C. Taylor, \$14.25, was, I remember, afterwards paid, Realty Company, money advanced, of uncertain, practically no value at that time.

Q. What was the amount of that?

A. \$2,375.69. It could not be collected.

Q. Did that corporation go into bankruptcy?

Mr. TULLER.—Objected to as incompetent, irrelevant and immaterial and referring to a time subsequent.

The SPECIAL MASTER.—Objection overruled.

A. Went into bankruptcy, yes.

Q. How soon after the 19th of March?

Mr. TULLER.—Same objection, and also not the best evidence.

Mr. CRAIG.—I will bring down the records from the United States Court, if necessary.

The SPECIAL MASTER.—Objection sustained.

(Testimony of Fielding J. Stilson.)

You may answer the [122] question subject to the objection.

Mr. CRAIG.—Don't want it.

Mr. TULLER.—I understand he is allowed to testify.

Mr. CRAIG.—I don't want him to testify.

Q. (By the SPECIAL MASTER.) Do you know when they went into bankruptcy? A. Yes.

Q. (By the SPECIAL MASTER.) When was it?
A. January, 1913.

Mr. TULLER.—That answer is subject to the other?

The SPECIAL MASTER.—Yes.

Q. Is that bankruptcy proceeding closed yet?

Mr. TULLER.—Object to that as leading.

Mr. CRAIG.—I want to find out, Mr. Tuller, if this has any value.

Mr. TULLER.—The fact that it went into bankruptcy nearly a year afterwards doesn't prove that it had no value in March.

A. W. F. Palmer, \$142.50, no value, marginal stock transaction, never made good.

Q. There is scheduled in Schedule B (3) C, Subdivision C insurance on office furniture \$500.00; what was that, Mr. Stilson?

A. Represented the furniture of the corporation.

Q. That was insurance? A. Oh, yes.

Q. Was that the amount of the policy, was that an asset?

Mr. TULLER.—That is a conclusion.

Q. Had there been a fire?

(Testimony of Fielding J. Stilson.)

A. No, no fire.

Q. Did you ever collect that \$500.00?

Mr. TULLER.—Objected to as leading and immaterial.

The SPECIAL MASTER.—Objection overruled. There are some things that long experience teaches, especially after fourteen years as [123] referee,—that assets are all collected as far as they are able to collect them. In other words, when they come down to these kind of assets, they are not worth a cent. They have exhausted every endeavor to get what they can.

Mr. TULLER.—When he asks question that are not proper, I object to them.

Argument by counsel.

Q. What was the value of that item scheduled in your schedules, \$500.00?

A. No value except in the case of fire.

Q. Never had one, did you? A. Never did.

Q. In schedule B (3) continued, the values placed upon those stocks and bonds in your schedules you stated as of April 22d, 1912,—do you remember whether or not the values of those stocks was more or less on that date than on March 19th?

Mr. TULLER.—You are referring to the date of April 22d?

Mr. CRAIG.—They are scheduled as of April.

A. They were more on—they were less—they were more on April 22d than on March 19th.

Q. So that on March 19th, 1912, they were of not any greater value than here stated? A. No.

(Testimony of Fielding J. Stilson.)

Q. You scheduled 140 Amalgamated Oil, \$8,400.00, was that the stock which was purchased from the Staats Company which is the subject of this litigation? A. It is.

Q. You scheduled the stock as belonging to you at that time? A. The corporation, yes.

Q. It had been hypothecated, had it?

A. According to the statement, 60 shares and a due bill, making 200 had been hypothecated. [124]

Q. So that this asset would be offset by a corporation liability? A. It would.

Mr. TULLER.—Why can't we eliminate both asset and liability?

Mr. CRAIG.—It stands as an asset of \$8,400.00. Of course there is a liability.

Q. University Club Holding Company, \$800.00, that was worth that amount at that time?

A. I believe so, yes.

Q. Riverside Home Telegraph Company bonds, \$1,400.00, that was the true value? A. Yes.

Q. So that these assets were of the value stated on April 22d?

A. Yes. There were a few dollars in the bank.

Mr. CRAIG.—I have not gone through every item; those that I didn't question I assume are assets as set forth in the schedules. It is 12:00 o'clock now and I am going up on another matter. Will you continue until this afternoon?

The SPECIAL MASTER.—Do you want to cross-examine him now?

Mr. TULLER.—I might.

(Testimony of Fielding J. Stilson.)

The SPECIAL MASTER.—How long will it take you?

Mr. TULLER.—I don't think very long.

The SPECIAL MASTER.—Then proceed.

Cross-examination.

(By Mr. TULLER.)

Q. You don't know, do you, what property those various parties whose names are listed in Schedule B (2) own?

A. No. I might examine them. I might know some of them.

Q. In your statement that you made a little while ago, you didn't consider whether you knew what property, or any property, [125] that they owned?

A. I knew that we couldn't collect the money. No, I didn't know.

Q. Now, then, coming to the case of Mary E. Stilson, that is the account of \$13,000.00, \$13,403.00, was of no value? I understood you to so testify.

A. She had no means in any way whatever of paying it.

Q. That was money expended for the building of her house advanced to her? A. Yes.

Q. No money wasted so far as you know in the building of the house? A. No.

Q. Didn't you consider that the properties that were covered by these two mortgages, one for thirty thousand and one for ten thousand, were worth in excess of \$40,000.00?

A. They could not be released.

Q. Were not those two properties worth more than

(Testimony of Fielding J. Stilson.)

forty thousand dollars? A. No.

Q. I don't mean the equities in them worth more than forty thousand dollars; were the properties worth more than the mortgages on them?

A. Yes.

The SPECIAL MASTER.—It is something that you don't understand. That blanket mortgage not only covered these two properties but a lot of other property. Mr. Stilson is talking about one thing and you another. He is talking about the blanket mortgage and you are talking about the two houses. You are asking whether or not the two houses were worth \$40,000. The two houses were not worth \$40,000 in themselves. He means the entire property under the mortgage.

Mr. TULLER.—But he testified that the account of Mary E. Stilson was not worth anything. [126]

Q. Now, didn't she have property?

A. She did not.

Q. (By the SPECIAL MASTER.) Were the houses and lots owned by Mary E. Stilson and yourself,—were they themselves worth \$40,000.00?

A. No.

Q. What were they worth? A. \$35,000.00.

Q. What other property was covered by the mortgage?

A. A large number of vacant property, the title to which stood in the corporation.

Q. What in your estimation was the value of those properties?

Mr. CRAIG.—Objected to on the ground that it is

(Testimony of Fielding J. Stilson.)

incompetent. It is cleary incompetent as to whether she was worth anything.

The SPECIAL MASTER.—Objection overruled.

A. According to the price list I presume the property was probably worth \$100,000.00.

Q. Then, in your best judgment the properties covering these two mortgages of \$40,000.00 were worth in the neighborhood of \$100,000.00; they had a mortgage of \$40,000.00 on a \$100,000 worth of property? A. Including my mother's.

Q. Correct. Did your mother have any other property except this house?

A. Except stock of the Fielding J. Stilson Company?

Q. Any other stock? A. No.

Q. Any bonds? A. No.

Q. Personal property?

A. Furniture in the house. [127]

Q. House fairly well furnished, wasn't it?

A. Comfortably, not extravagantly.

Q. Didn't you consider your stock in the Fielding J. Stilson Company worth anything on the 19th day of March? A. I did not.

Q. Didn't you consider at that time the corporation was solvent?

Mr. CRAIG.—I object to that as incompetent, irrelevant and immaterial and calling for a conclusion of the witness.

Mr. TULLER.—He has expressed his opinion that his account was worth nothing. It is cross-examination.

(Testimony of Fielding J. Stilson.)

Mr. CRAIG.—I don't think it is cross-examination that he considered the Fielding J. Stilson Company was insolvent.

The SPECIAL MASTER.—You may answer the question subject to the objection. I think the objection that it is incompetent,—that is the very question that we are to determine here. I am going to sustain the objection, but I am going to let him answer the question.

Q. Did you consider the stock of the Fielding J. Stilson Company worth anything on the 19th day of March? A. I did not.

Q. Did you consider the Fielding J. Stilson Company solvent or insolvent?

Mr. CRAIG.—Objected to as—

The SPECIAL MASTER.—Answer the question.

A. I tried to be as optimistic as possible, but I confess that as I look back it was insolvent.

Q. What did you consider it worth at that time?

A. As I say, I was trying to be optimistic.

The SPECIAL MASTER.—Answer the question.

A. I don't know.

Q. Why did you make an appraisement showing a substantial margin of assets over liabilities when you considered it insolvent? [128]

A. I didn't make the appraisement.

Q. Who made the appraisement?

A. Three realty men here.

Q. Where was this—coming to the item of Oleum Development Company,—coming to the item of Oleum Development Company, money advanced,

(Testimony of Fielding J. Stilson.)

where was that money advanced, in California?

A. In California, yes.

Q. The Oleum Development Company had a large number of California stockholders, did it not?

A. It did, yes.

Q. Do you know whether the Los Angeles California Realty Company was a California company?

A. It was.

Q. It had a number of stockholders, did it not?

A. It had only five.

Q. Were they residents of California?

A. Yes.

Q. (By the SPECIAL MASTER.) Who were they?

A. My mother, my brother, W. H. Anderson, I think Ora Buckley, and myself.

Q. Another Stilson concern, was it?

A. Yes, absolutely.

Q. Have any assets? A. Yes.

Mr. TULLER.—There may be something else I would like to ask.

The SPECIAL MASTER.—We will continue until Tuesday at 10:00 o'clock. [129]

Los Angeles, Cal., April 27, 1915.

10:00 o'clock A. M.

FIELDING J. STILSON, on the stand.

Redirect Examination.

(By Mr. CRAIG.)

Q. Mr. Stilson, I will now renew the question which was asked of you at the last hearing, and will ask you whether or not the schedules in bankruptcy

(Testimony of Fielding J. Stilson.)

filed herein accurately schedule the amount of the indebtedness of the Fielding J. Stilson Company at the time they went into bankruptcy?

Mr. TULLER.—I wish you would make that date a little more specific. What date do you refer to?

Mr. CRAIG.—Just strike out those words “at the time they went into bankruptcy” and add, “the time the schedules were filed on the 27th day of November, 1912.”

Mr. TULLER.—Objected to as irrelevant and immaterial.

The SPECIAL MASTER.—Objection overruled.

A. According to my best knowledge and belief the schedules did.

Q. I believe that you testified, Mr. Stilson, that between the 19th day of March, 1912, and the 27th day of November, 1912, the Fielding J. Stilson Company incurred no further or other liabilities, is that a fact?

A. It is.

Mr. TULLER.—I want that subject to the same objection, not sufficient foundation.

The SPECIAL MASTER.—Same ruling. That is all in here.

Q. The amount of the liabilities as given in the schedules is \$257,760.87, was that the amount of the liabilities approximately, within a thousand dollars, on the 19th day of March, 1912?

(Pencil figures on back of page.) [130]

Mr. TULLER.—Same objection.

A. It was.

The SPECIAL MASTER.—Same ruling.

Mr. CRAIG.—I presume that counsel has exam-

(Testimony of Fielding J. Stilson.)

ined the expert accountant's report and that he is objecting upon the ground that there is no foundation laid or not the best evidence.

The SPECIAL MASTER.—He objects to it because he says that Mr. Stilson is not the one who knows it.

Mr. TULLER.—Objected to as not the best evidence.

Mr. CRAIG.—In order that there shall be no possibility of the status as to this proof, at the last hearing Mr. Tuller was to examine the expert accountant's report and examine the books to ascertain whether it would be necessary to bring the expert here to prove the condition of the books and whether it would be necessary to introduce the books in evidence. Mr. Tuller has objected to the testimony of Mr. Stilson upon the ground that there has no proper foundation been laid. I will ask Mr. Tuller if the schedule of the liabilities as shown by the expert accountant's report and by the books of the Fielding J. Stilson Company, which according to that report amounts on April 25, 1912, to the sum of \$256,682.53, as admitted.

Mr. TULLER.—Well, now Mr. Craig, I don't want to be over technical in this matter, but after I examined those books I knew less than I knew before. I never saw such books. The expert accountant stated in his report that a good deal of the report is taken from information obtained from Mr. Allen and from Fielding J. Stilson, no entries in the books to correspond with lots of it. I don't want to put you to any unnecessary trouble; neither do I want to stipulate my case away. I would suggest that we go ahead

(Testimony of Fielding J. Stilson.)

and perhaps before we get through there will be no necessity of Mr. Palethorpe or the books. [131]

Mr. CRAIG.—I understood from Mr. Allen that he had spoken to you and you said that it would not be necessary to bring Mr. Palethorpe here to-day to prove those items.

Mr. TULLER.—To-day, I didn't want to bring him here. My idea will be to proceed as far as we can. I will certainly endeavor not to bring him here.

Mr. CRAIG.—I have no objection to going through these schedules item by item and asking whether or not the obligation which is scheduled here was an obligation of the company.

Mr. TULLER.—I understand that there have not been anything like the amount of claims filed that are scheduled in that schedule.

Mr. CRAIG.—That is because most of the indebtedness scheduled is secured indebtedness, and of course no proof of debt is necessary.

Mr. TULLER.—Do you know, are you able to tell me, Mr. Craig, whether, outside of the secured indebtedness, there have been claims filed representing the same amount of indebtedness shown in that?

Mr. CRAIG.—I have not figured them up and cannot tell you.

Mr. TULLER.—I have a list which I got from the bank yesterday; it appears to be very much less, twenty-six thousand allowed claims, and I didn't figure up the rest; certain claims which were irregular, but it don't look like there was anything like the amount. Can't we go ahead with the rest of the case, and if necessary we can bring Mr. Palethorpe here,

(Testimony of Fielding J. Stilson.)

and if not we can remedy that—

The SPECIAL MASTER.—I understand the record shows that Mr. Stilson himself says that according to his own knowledge the indebtedness was at least two hundred fifty thousand dollars.

Mr. TULLER.—I don't know whether he so testified from his own [132] knowledge or recollection of the books.

The SPECIAL MASTER.—That was before he was shown the schedules.

Q. Mr. Stilson, you were the general manager of the corporation? A. I was.

Q. Did you know approximately the amount of your indebtedness? A. I did.

Q. On the 19th day of March, 1912, what was the amount of that indebtedness?

A. About two hundred and fifty to sixty thousand dollars, as shown by the schedule or our accountant's report, Palethorpe's.

Q. As general manager and president of the company you knew that outside of those schedules and the report?

Mr. TULLER.—It seems to me that is pretty leading, your honor.

The SPECIAL MASTER.—That is leading.

Mr. TULLER.—While we are on that point I would like to ask a question.

The SPECIAL MASTER.—Proceed.

Q. (By Mr. TULLER.) When you make the statement as to the amount of your indebtedness, are you speaking of your independent recollection or re-

(Testimony of Fielding J. Stilson.)

lying on your books? A. Both.

Q. (By Mr. TULLER.) In part you are relying on your books? A. Yes.

Q. (By Mr. TULLER.) If at that time you had in your head the items of indebtedness, you are not able now to recall them independent of your books?

A. I think that question is best answered by the schedules.

The SPECIAL MASTER.—He wants to know if you have an independent recollection, and if you went over each item, if you could testify as to its being correct.

A. I didn't go over it at that time on account of my illness.

The SPECIAL MASTER.—The question is, could you do it now? Could you say whether an item was correct? [133]

A. Yes, if I had those items, if I am permitted to use the schedules and that.

Q. By the "schedules" you mean the schedules filed, and by "that" you mean the report of Mr. Palethorpe? A. Yes.

Q. You and your brother assisted in making this report?

A. My brother and I, I recovered before Mr. Palethorpe made up the report, and returned to my work and assisted in making that report; Mr. Hargreaves, my bookkeeper, also assisted.

Q. (By Mr. TULLER.) The point I want is, do you remember, independent of your books, all of the accounts owed on March 19th, 1912?

(Testimony of Fielding J. Stilson.)

Mr. CRAIG.—I think that is immaterial. I couldn't attempt to tell you what I owed.

A. I could not give you item for item, but in a general way I know that we were involved to about that amount.

Mr. TULLER.—You made a finding on that. That is the finding on which the adjudication in bankruptcy was made.

The SPECIAL MASTER.—You may save the point.

Mr. TULLER.—It is a question more or less of testing the accuracy of his recollection.

Q. Mr. Stilson, when, with relation to the 19th of March did your company first find itself in financial difficulty?

Mr. TULLER.—Objected to as irrelevant and immaterial, and also too vague and indefinite as to what is meant by finding himself in financial difficulty.

Mr. CRAIG.—Preliminary question, I will follow it up.

The SPECIAL MASTER.—Objection overruled.

A. To the best of my recollection, about the 12th or 13th of March, 1912.

Q. Now, in what financial difficulties did you find yourself at that time? [134]

Mr. TULLER.—Same objection may be considered all through?

The SPECIAL MASTER.—All right.

A. Unable to meet the immediate necessities of the business owing to the failure to obtain certain funds promised.

(Testimony of Fielding J. Stilson.)

Q. How was that financial difficulty evidenced in your business?

A. By some checks that had been given for securities and had been unable to be paid on account of not sufficient funds.

Q. Have those checks gone to protest?

A. I am not certain of that.

Q. Had they been presented at the bank and refused payment? A. They had.

Q. What was the amount of them, approximately?

A. I think twenty thousand dollars, about.

Q. Was the Fielding J. Stilson Company a member of the stock exchange of this city at that time?

A. No, I was, as president, represented.

Q. You were personally a member of the stock exchange representing the company?

A. The Exchange recognizes only individuals, not corporations.

Q. The members of the Exchange then are made up of individuals representing themselves and individuals representing the various corporations?

A. Yes.

Q. And you were the representative of your corporation? A. I was.

Q. Was any action taken by the Stock Exchange with relation to the financial affairs of yourself or the Fielding J. Stilson Company?

Mr. TULLER.—Objected to as irrelevant and immaterial and no time specified.

Mr. CRAIG.—I will follow that up by finding out. I don't know the time. [135]

(Testimony of Fielding J. Stilson.)

The SPECIAL MASTER.—You may answer, yes or no.

A. Some action was taken.

Q. When?

Mr. TULLER.—Same objection, irrelevant and immaterial.

The SPECIAL MASTER.—Of course it would not be material unless it was known to the defendant.

Mr. CRAIG.—I am going to try to show.

Mr. TULLER.—Then, subject to being connected up?

The SPECIAL MASTER.—Yes.

A. I, as representative, was suspended, as representative, on the 20th of March, 1912.

Q. Was any member of the William R. Staats Company a member of the Exchange?

A. They had a representative there.

Q. Who?

A. I believe the membership was represented by Mr. John E. Jardine.

Q. Mr. Jardine who is present here to-day?

A. Yes. The membership stands in Mr. Jardine's name. And they are represented by Mr. Brooks on the Exchange. He is what is commonly called the floor man, as I understand it.

Q. These checks that were bad were given by your company for what? A. For securities.

Q. Did they represent payments made as a result of transactions held on the Stock Exchange?

Mr. TULLER.—That is leading.

The SPECIAL MASTER.—Yes or no.

(Testimony of Fielding J. Stilson.)

A. No. Well, I will explain, your honor. They did not go through, the business was not conducted through the clearing house, but the stocks were purchased, what is known as off board. The purchase may have been agreed upon on the floor during hours but the checks were delivered to officers of the respective payees. [136]

Q. (By Mr. TULLER.) It was not a deal that went through the stock exchange as official deals, as on board deals?

A. They may have been. It was customary at that time to clear transactions off board.

Q. Did they represent transactions with the members of the stock exchange?

Mr. TULLER.—I think counsel ought to ask the facts and not lead the witness.

The SPECIAL MASTER.—All right, Mr. Craig.

Q. Did they or not represent transactions with the members of the stock exchange? I am not leading the witness. I think the question is proper.

The SPECIAL MASTER.—Try and confine yourself to in the first instance finding out what the facts were with reference to those checks.

Q. Did those transactions that involved the giving of those checks that you have mentioned take place with members of the exchange or with nonmembers?

A. With members of the exchange or their direct representatives.

Q. Did you have any transaction at about that time, just prior to the 19th of March, with William R. Staats Company? A. I did.

(Testimony of Fielding J. Stilson.)

Q. What was the date?

A. I think the purchase of the 200 shares Amalgamated was on the 12th or 13th of March, 1912.

Q. State the transaction?

A. I purchased from William R. Staats 200 shares of Amalgamated Oil, I think \$60.00 a share.

Q. That will be \$12,000.00.

A. Yes. There was delivered to me 50 shares of stock itself and a due bill,—no, 60 shares of stock itself and a due bill [137] commonly given to brokers, fellow members of the exchange, for 140 shares. That due bill, together with the stock was deposited—

Mr. TULLER.—I object now to what the parties may have done, to a recital of something that did not transpire between this man and the Staats Company, on the ground that it is between other parties. He is starting to relate what he did.

Mr. CRAIG.—I think the whole transaction is perfectly material.

The SPECIAL MASTER.—The deposit of the stock with somebody else, the Citizens' National Bank, has nothing to do with the matter. The matter is confined simply to transactions between himself and Mr. Jardine or the Staats Company, what was the transaction with them, not with somebody else.

Q. The check which was tendered to this firm was payable to William R. Staats Company?

A. Yes, made payable to them. It was not met and it was returned.

Q. That was the check for \$12,000.00? A. Yes.

(Testimony of Fielding J. Stilson.)

Q. Then, what was done?

A. As I remember I—either I went to Mr. Jardine's office to see him or he telephoned.

Q. What day?

A. It was Saturday which was either the—I would have to look at the dates of the calendar to observe,—state that. It was Saturday before the 19th of March, 1912, so it must have been Saturday, the 16th of March, or 15th.

Q. How many days was it subsequent to the 12th when you gave the check?

A. One or two days. The date of that check may have been the 14th. I am not certain. The record will show it.

Mr. CRAIG.—Have you that check, Mr. Tuller?
[138]

Mr. TULLER.—Yes.

Mr. CRAIG.—May I see it?

Mr. TULLER.—You may but I would rather the witness did not see it for the present.

Q. You think it was on the Saturday after the giving of the check? A. Yes.

Q. Had any part of the check been paid up to that time? A. No.

Q. What happened, state the conversation between you at that time?

A. I discussed with Mr. Jardine the situation.

Mr. TULLER.—Well, now, if your honor please, this—

The SPECIAL MASTER.—State what you said to Mr. Jardine and what he said to you?

(Testimony of Fielding J. Stilson.)

A. As I remember, I told him I felt sure I could make the item good.

Q. What did he say?

A. As I remember, he said he would give me time, help me in any way he could.

Q. Did you tell him anything with relation to any other checks at that time?

Mr. TULLER.—I object to counsel suggesting this important conversation, suggesting about it to the witness; he should ask what was stated by Stilson and what was stated by anybody else.

The SPECIAL MASTER.—I think that is proper. Let him state all that took place.

Q. Was there anything else stated between you and him with relation to the check which you had given him? A. There was.

Q. State what it was?

A. Mr. Jardine, as I remember, called at my office Monday morning following Saturday. [139]

Q. Let us confine ourselves to the Saturday conversation, Mr. Stilson, first?

A. I am not certain as to the conversation I referred to, whether it took place on Saturday or Monday.

Q. Well, you saw him again on Monday?

A. He called at my office with Mr. Coggeshall.

Q. What is that last?

A. He called at my office with Mr. Coggeshall.

Q. State what was said at that time?

A. I—of course it has been so long ago that I cannot absolutely give statements of what was said. I

(Testimony of Fielding J. Stilson.)

believe there is a statement or record of that conversation.

Q. (By the SPECIAL MASTER.) Testify as near to your recollection as you can?

Q. Give the substance of it, Mr. Stilson? I believe you said you did not remember whether some part of this conversation took place on Monday or Saturday. I want you to state the conversation, and if you can, state which day it occurred?

A. I am certain it was Monday that Mr. Jardine and Mr. Coggeshall called at my office and we discussed the situation.

Mr. TULLER.—I object to that.

Q. (By the SPECIAL MASTER.) State the substance of what was said?

A. I reiterated the statement that I would be able in my judgment to come out of the situation all right, and I informed Mr.—

Q. (By Mr. TULLER.) State what you said?

A. Mr. Jardine asked, or Mr. Coggeshall asked, if I had other items and I said I did, that is, I had other checks that had been turned down. I assured them at that time that I would do everything to protect them.

Q. Did you at that time tell them how many checks had gone bad? A. I believe I did.

Q. Do you remember anything further that was said at either of those conversations? [140]

A. My recollection is that they said they would wait till to-morrow, give me another day, extend the time for making good the check.

(Testimony of Fielding J. Stilson.)

Q. Was anything said at either of those conversations by you as to how you would make good?

A. Yes.

Q. Well, state what was said?

A. I had made a tentative transaction for the sale of some real estate.

Q. (By Mr. TULLER.) Are you relating facts or what you told them. A. I am relating facts.

Mr. TULLER.—The question is what you said.

The SPECIAL MASTER.—Mr. Stilson, not the fact that you had made a tentative transaction, but what you told them.

A. Yes, I told them I had made a tentative proposition which would bring me \$10,000.00 cash and that I would, upon receiving this money, which I expected the next day, take care of their item first.

Q. Do you remember when you next saw anybody connected with the William R. Staats Company?

A. I believe it was the following Tuesday, the 19th of March, 1912.

Q. Did you not see anyone connected with the Staats Company between those dates?

Mr. TULLER.—They were successive dates.

A. It was possible I did.

Q. Did you mean the following day when you said Tuesday?

A. I meant the following day. As I remember I called at Mr. Jardine's office.

Q. State what was said then?

A. I,—as I remember, I said to Mr. Jardine that I had not yet received the \$10,000 and that I felt

(Testimony of Fielding J. Stilson.)

uncertain as to the immediate future for the reason that I had been advised that my transaction [141] had failed of consummation. That information was conveyed to me Monday evening late, and on Tuesday I called at Mr. Jardine's office.

Q. What did he say?

A. Something as to how I could meet it or what I was going to do about it, and I said I would do everything within my power to protect them and proposed to give them collateral in the nature of equities on certain real estate of the corporation. Mr. Staats said to me that he thought that would be all right if the equity was as represented. Mr. Coggeshall was there, either called into the conversation or was there, I am not certain, but the arrangement was made between Mr. Coggeshall and myself to inspect this property and an appointment agreed upon to go that afternoon.

Q. What time of day was it when you called at the office of the William R. Staats Company?

A. I should say half past ten or eleven.

Q. What time was the appointment made to go and inspect the property?

A. I think half past two or three in the afternoon. I then kept that appointment with Mr. Coggeshall and we went out to see the property.

Q. What kind of a conveyance did you take?

A. Automobile

Q. Whose? A. Mine.

Q. Did you call at the office of the William R. Staats Company and get Mr. Coggeshall?

(Testimony of Fielding J. Stilson.)

A. Yes.

Q. What did you do then?

A. We went to review the property and I showed Mr. Coggeshall the individual lots that I proposed to give him or rather to be covered by the trust deed. [142]

Q. What had been said about a trust deed before that?

A. That was agreed upon. It was to be secured by a trust deed.

Q. Who suggested this trust deed?

A. I think Mr. Jardine did, because there was a first mortgage on the property. After inspecting the property we returned—

Q. How long were you inspecting the property?

A. About an hour and a half.

Q. How many properties did you inspect?

A. I have forgotten, anywhere between six and a dozen.

Q. Did you inspect any property except that that was included in the trust deed afterwards?

A. No, only those in the trust deed.

Q. Did you tell him the value of the property?

A. I gave him my list of the property showing what we were asking for the property.

Q. Do you remember how much that was, approximately?

Mr. TULLER.—I object; the list is the best evidence if it is obtainable. There may be copies of the listings.

The SPECIAL MASTER.—The trustee has al-

(Testimony of Fielding J. Stilson.)

ways had a list; that, as I understood, was the list that we went by, is that a fact, Mr. Stilson?

A. Yes, filed with the trustee.

Mr. TULLER.—If it is important you can get it from them.

Mr. CRAIG.—I don't think the question is objectionable. I am not asking for the contents of the list. I am asking him if he knows approximately what he told Mr. Coggeshall the value was.

Mr. TULLER.—He said he gave him a list.

Q. (By the SPECIAL MASTER.) What did you say about it?

A. I informed Mr. Coggeshall that some of the properties were covered by a mortgage to the Pacific Mutual Life Insurance Company and other of the properties included in the trust deed were [143] covered by other minor mortgages, smaller mortgages to other people, not the Pacific Mutual, and, as I remember, the property as represented by the trust deed—

Mr. TULLER.—Well, now, this isn't something you told him?

A. I told him, as I remember, that the property represented by the trust deed was probably worth, that is the equity, from twenty to twenty-five thousand dollars.

Q. Had any part of that \$12,000 check been taken care of in any way up to that time? A. No.

Q. Well, what happened after that?

A. We returned to the Staats Company's office and—

(Testimony of Fielding J. Stilson.)

Q. About what time did you reach the office?

A. Half past four, and Mr. Coggeshall reported in my presence to Mr. Jardine that the representations made by myself were correct and that the property was in his judgment, so he stated in my presence, of the value—

Mr. TULLER.—I don't understand; I object unless there is some reason shown of the conversation between Mr. Jardine and Mr. Coggeshall.

The SPECIAL MASTER.—Objection overruled.

Q. Proceed, Mr. Stilson.

Q. (By the SPECIAL MASTER.) What Mr. Coggeshall said in your presence to Jardine?

A. He said that.

Q. What did he say?

A. That the transaction was satisfactory. My brother and I then signed the instrument, the trust deed.

Q. Will you,—what was done after this conversation?

A. Oh, we proceeded to the Title Insurance and Trust Company.

Q. At whose suggestion?

A. Mr. Coggeshall's. [144]

Q. You left the office of the William R. Staats Company and went to the Title Insurance & Trust Company? A. Yes.

Q. At Franklin and Broadway? A. Yes.

Q. What time did you reach there?

A. Twenty minutes to five.

Q. What occurred at the Title Insurance and Trust Company's office?

(Testimony of Fielding J. Stilson.)

A. As I remember, this deed was prepared.

Q. Who prepared the deed of trust?

A. The Title Insurance and Trust Company or some clerk.

Q. While you were there—what is your brother's name? A. Carroll H. Stilson.

Q. What is his relation to the Fielding J. Stilson Company? A. Secretary.

Q. Was he there? A. No.

Q. Well, the trust deed was prepared by the Title Insurance & Trust Company; did they also prepare the note? A. I believe so.

Q. That note was for \$3,870.00? A. Yes.

Q. Why was it for \$3,870.00 and not for \$12,000.00?

Mr. TULLER.—Objected to as irrelevant and immaterial and a conclusion of the witness.

The SPECIAL MASTER.—Objection sustained.

Q. Why was it not the amount of the check?

Mr. TULLER.—Same objection.

The SPECIAL MASTER.—Objection sustained.

[145]

Q. State the conversation that occurred between you and the William R. Staats Company or any representative with reference to the amount that should be in this deed of trust?

Mr. TULLER.—Same objection.

The SPECIAL MASTER.—Objection overruled.

A. As I remember, they desired to be—

Q. Just state what was said?

A. I cannot answer.

(Testimony of Fielding J. Stilson.)

Q. (By the SPECIAL MASTER.) Give the substance of it?

A. The substance was that the William R. Staats Company wanted to be secured only for the 60 shares of stock. They didn't recognize the due bill.

Q. By the SPECIAL MASTER. State whether or not that amount was the amount of the due bill.

A. Yes, this amount.

Q. (By the SPECIAL MASTER.) Of the 60 shares of stock?

A. Represented, as I remember, \$3,600.00 for the stock and certain charges, trust charges.

Q. What was the 60 shares of stock taken at, at what figure?

A. As I remember, it was sixty or sixty-two. I am not certain. The check would show.

Q. The balance of the \$3,870.00 was made up by the charges of the trust company for the—acting as trustee in the trust deed?

Mr. TULLER.—Objected to as leading and suggestive.

The SPECIAL MASTER.—Objection sustained.

Q. What was the total amount of the account?

Mr. TULLER.—He said he didn't remember.

The SPECIAL MASTER.—It is in the record already that it was made up of the value of the stock, the 60 shares, and the charges of the company, and he thinks the stock was sixty or sixty-two dollars, but the check will show. [146]

Q. (By the SPECIAL MASTER.) What check will show?

(Testimony of Fielding J. Stilson.)

A. The check would not show. I didn't understand the question, your Honor. The check was for \$12,000 and the trust deed was for \$3,870.00.

Q. This trust deed was for the value of the stock plus certain charges—what charges?

A. Charges that are usually made by the Title Insurance & Trust Company for handling trust deeds.

Q. Was the note prepared by the Trust Company?

A. I believe so.

Q. After it was prepared was anything said about an abstract or certificate of title by any body?

A. No, except my statement that I made to them that the property was covered by those mortgages. I didn't offer any certificate. They didn't ask for one.

Q. Was any abstract or certificate demanded of you to show the title to the property? A. No.

Q. After the trust deed and note was prepared, then what was done?

A. Mr. Coggeshall and I returned to the office of William R. Staats Company and I called by brother in and we signed the instrument.

Q. Where was your brother?

A. In our office, 115 W. 4th Street.

Q. Did you telephone to him or call for him?

A. I think we telephoned.

Q. Were the note and the trust deed signed at the office of the William R. Staats Company?

A. As I remember it, yes. My memory is not absolutely clear on that, but I know we signed it

(Testimony of Fielding J. Stilson.)

after it was prepared, as I remember, in the office of the William R. Staats Company. [147]

Q. The corporate seal was placed upon it?

A. Yes. It was signed in the office of one of the two companies, that is in the Fielding J. Stilson Company or the Staats Company; we may have brought the seal in.

Q. Do you know where the seal was placed upon the instrument?

A. I perhaps correct myself on that. On the general idea that the seal of our corporation was kept in our office, it may be that the trust deed was brought into our office.

Q. Now, Mr. Stilson, are you certain that it was not signed at the Title Company?

A. I am not certain, absolutely. I was in such a condition at the time that my memory was not clear as to where that was signed.

Q. Did you deliver the note and the mortgage to a representative of the William R. Staats Company?

A. I did.

Q. Do you remember whom?

A. I think to Mr. Jardine or Mr. Coggeshall.

Q. What was said by you to them with reference to the other checks outstanding, if anything, on that day? A. Nothing.

Q. Was anything said by any representative of the William R. Staats Company with relation to the other checks?

The SPECIAL MASTER.—Answer the question.

A. Nothing. You refer to Tuesday?

Q. Yes? A. Nothing?

(Testimony of Fielding J. Stilson.)

Q. Did they inquire of you at any time whether—

Mr. TULLER.—I object to this continual suggestion; as soon as a question is asked it is suggested to the witness. It seems to me my patience has reached the limit.

The SPECIAL MASTER.—You sat still and got the answers. I don't think Mr. Craig knows anything about it. I said before you should [148] find out all that was said without leading the witness, and I think you should.

Mr. CRAIG.—This witness has testified to all that he remembered of those two conversations. He hasn't been asked as to whether that was all that was said.

The WITNESS.—That was all that was said. I went home and was ill.

The SPECIAL MASTER.—We will adjourn now until 2:00 P. M. [149]

Los Angeles, California, April 27, 1915,
2:00 P. M.

FIELDING J. STILSON on the stand.

Redirect Examination (Continued).

(By Mr. CRAIG.)

Q. Have you detailed the conversations, Mr. Stilson, as far as you remember them, that occurred between you and the representatives of the Staats Company concerning this transaction?

A. You mean the ones I referred to this morning?

Q. Yes, sir, at the times mentioned this morning.

A. I didn't hear the first part of that question.

Q. Have you detailed all of the conversations--

(Testimony of Fielding J. Stilson.)

A. Yes, I have.

Q. You testified this morning that you informed the Staats Company, or their representative, concerning the other checks that had gone bad, state whether or not at any subsequent conversation these were again referred to between the parties?

Mr. TULLER.—I object to that as irrelevant and immaterial, and relating to a time subsequent to March 19th.

Mr. CRAIG.—I will add, “and before the giving of the trust deed?” A. I did.

Q. What was said, and to whom, and at what time?

A. As I remember—

The SPECIAL MASTER.—Give the persons to whom you said it to and the time and the place.

A. May I be permitted to qualify? As I remember, I said to Mr. Jardine on Monday and on Tuesday at the two stated interviews that there were other checks out that I could not meet.

Q. When the trust deed and note were executed to whom did you deliver them? [150]

A. The William R. Staats Company.

Q. What person?

A. I believe Mr. Coggershall.

Q. Was Mr. Jardine present?

A. I am not certain.

Q. At the final interview with Mr. Jardine what was said?

Mr. TULLER.—I do not understand what interview you refer to as the final interview.

Mr. CRAIG.—The last one prior to the 19th of March, 1912.

(Testimony of Fielding J. Stilson.)

A. On the 18th of March, which was Monday, I said to Mr. Jardine that I would protect them in every way possible by giving them a trust deed on the equities in the properties, and he said that if the value was there as indicated by me that the arrangement would be satisfactory. Mr. Jardine made that statement to me.

Q. What statement, if any, was made to you by Mr. Coggeshall at the time that you delivered the trust deed to the company?

Mr. TULLER.—I object to statements made by Mr. Coggeshall on the ground that it does not appear that Mr. Coggeshall had any authority to bind the defendant William R. Staats Company by conversations or matters of fact; so far as appears now he was simply an appraiser directed to go out and look over the property; that is not a captious objection because as a matter of fact he had no right to enter into any negotiations for the Staats Company, as I understand it.

Mr. CRAIG.—He was appointed by the Staats Company to close this matter up.

Mr. TULLER.—He was the agent, as I might be an agent, to see to the details between Mr. Jardine and Mr. Stilson, that is my understanding of the situation; that is certainly all the evidence shows to this point. [151]

The SPECIAL MASTER.—The objection will be sustained until you lay some further foundation.

Q. (By the SPECIAL MASTER.) Mr. Stilson, what—did you say anything to them about the amount of those other checks that were outstanding?

(Testimony of Fielding J. Stilson.)

A. I believe that I did.

Q. (By the SPECIAL MASTER.) What did you say?

A. I remember stating that there were a number of checks amounting to perhaps eight or ten thousand dollars more than their check that I could not meet at the immediate time.

The SPECIAL MASTER.—Proceed, Mr. Craig.

Q. I am going back to the schedules in bankruptcy and ask you a few questions with relation to some items that I overlooked,—

Mr. TULLER.—Let me ask at this time—pardon the interruption—there have been various references to the Palethorpe report. Has that been offered in evidence?

Mr. CRAIG.—No, sir, I have been trying to get you to stipulate that it was a correct statement of the assets and liabilities.

Mr. TULLER.—Maybe I shall, I certainly won't object if you admit it was a true statement of the assets. If you will admit that the appraisement was the appraisement of persons well qualified, I will admit it. You know that to be a fact.

Mr. CRAIG.—I know that is not a fact. Anybody that would appraise property at those values is certainly not qualified. Argument by counsel.

Q. In your schedules, Schedule B (2), you schedule machinery—office furnished and fixtures located at 314 H. W. Hellman Building, of the value of \$1,185.63, how did you arrive at that valuation?

Mr. TULLER.—Objected to as irrelevant and immaterial—I will withdraw that.

(Testimony of Fielding J. Stilson.)

A. Why, the cost.

Q. Do you know what they were worth?

A. No. [152]

Mr. TULLER.—I object to the witness—

The SPECIAL MASTER.—He says he doesn't know.

Mr. CRAIG.—I presume it will be stipulated that they weren't worth any more than they cost?

Mr. TULLER.—You have been so kind in your stipulations to-day that I will do that.

Q. You scheduled \$933.88 in the Hibernia Savings Bank, \$5.00 in the Commercial National Bank, \$4.64 in the First National Bank, and \$1.79 in the Merchants National Bank, what did that represent?

A. Cash.

Q. On hand?

A. Except the Hibernian, there was an attachment on that, not negotiable.

Q. But it was cash belonging to the company?

A. Yes.

Q. But which had been attached and you could not use it? A. Yes.

Q. How long have you been a member of the stock exchange, Mr. Stilson?

A. I believe I was elected in 1903 or 4.

Q. Were you familiar with the value of seats on the stock exchange in 1912 from March to November? A. Yes.

Q. You had a seat on the exchange at that time?

A. Yes.

Q. Why did you schedule that seat on the Exchange as an asset of the corporation?

(Testimony of Fielding J. Stilson.)

A. I felt that it was an asset of the corporation.

Q. You felt that you were holding the seat as a mere trustee of the corporation? A. Yes.

Q. And that was a real asset of the corporation?
[153]

A. Yes.

Q. What was its value?

Mr. TULLER.—I don't believe there is sufficient foundation laid for that.

The SPECIAL MASTER.—Objection overruled. You can cross-examine.

Q. What was the value, Mr. Stilson?

Mr. TULLER.—You refer to March, 1912?

Mr. CRAIG.—Yes, on March 19th, 1912.

A. I have forgotten, the seat was sold—

Mr. TULLER.—I object to what the seat was sold for at a subsequent time.

Mr. CRAIG.—What it was sold for is not evidence of its value, I suppose.

A. Well, say \$1,500.00, but I am guessing at that.

Mr. TULLER.—What does the schedule show?

Mr. CRAIG.—\$1,500.00.

Q. You schedule in schedule B (3) certain stocks and bonds, that was your business dealing in stocks and bonds was it? A. A real asset.

Q. You were familiar with the market price of stocks and bonds at that time, in March, 1912?

A. Yes.

Q. You scheduled 15 shares of San Diego Home at \$100.00, and you state that it is hypothecated to M. D. Spalding for \$750.00, what was the value of that stock?

(Testimony of Fielding J. Stilson.)

A. There was 80 shares of University Club Holding Company together with it. The value of the San Diego was, I think the market was \$7.00 a share, not over \$7.00 a share.

Q. One share of Home Telephone preferred which you scheduled at \$30.00?

A. That was the market quotation. [154]

Q. That was the market value of it?

A. Could be sold for that money.

Q. You schedule one share of Los Angeles Bond & Mortgage Company and apparently do not carry out the value? A. No value whatever.

Q. 140 Amalgamated Oil which you schedule for \$8,400.00, was that the Amalgamated which you got from the Staats Company?

A. That was the due bill I got from the Staats Company.

Q. (By the SPECIAL MASTER.) You didn't give up that due bill that night when you gave the trust deed?

A. It was turned over as collateral to Lateau; it was in their possession.

Q. At the time you settled with Staats? At the time Staats took this trust deed? Yes?

Q. Then, you claim that that due bill was an asset of the company?

Mr. TULLER.—I object to what the witness claimed, not a matter of fact, important in this case.

Mr. CRAIG.—Strike that question out.

Q. Was that an asset?

Mr. TULLER.—Objected to as calling for a conclusion.

(Testimony of Fielding J. Stilson.)

The SPECIAL MASTER.—Answer the question.

A. It was.

Q. You say it had been used as collateral security on some of its obligations? A. Yes.

Q. You scheduled 210,000 shares of Oleum Development Company and you place no value in the schedules after that, was that stock of any value?

A. None whatever.

Q. I believe you testified that the University Club Holding Company stock was worth the \$800.00?

A. Yes. [155]

Q. 10 Santa Monica Bay Home Telephone Company which you schedule at \$50.00, what was the value of that?

A. The market value of that was \$5.00 per share, that is, it could be sold for that.

Q. \$100.00 Los Angeles County Club Bond, what was the value of that?

A. The bond was probably worth that.

Q. 70 Johnnie Mining & Milling Company, \$5.60?

A. That was the market value.

Q. 500 Bonnie Claire Mining Company scheduled at \$10.00? A. The market value.

Q. You place no values after 1,000 McKittrick Investors Oil Company, 3,000 Goldfields Eureka Company, 6,000 Cleveland Oil Company and 6,000 Midway Union Oil Company? What were the values of those various stocks? A. Didn't have any.

Mr. TULLER.—Is that the company that has since become rather valuable, the Midway Union?

A. I don't know.

(Testimony of Fielding J. Stilson.)

Q. \$3,500.00 Riverside Home Telegraph Bonds, 7, which is scheduled at \$1,400.00, what was the value of that? A. \$1,400.00.

Mr. CRAIG.—That is all. Take the witness.

Recross-examination.

(By Mr. TULLER.)

Mr. TULLER.—At this time, your Honor, while I think of it, I want to make a statement which in fairness I probably should have made earlier. At the time the application was made for reference, we opposed it on the ground that it ought to be tried before the other court; the order being made you would have no discretion except to try the case, but I do not want to waive [156] any right in hearing us before the Court. I think I am right in thinking you would have no preference but to try the case, and there is therefore no need to make a formal objection.

The SPECIAL MASTER.—No.

Mr. TULLER.—Our objection was not at all to the man who would try the case but simply to jurisdiction.

Q. Now, Mr. Stilson, what was your mental condition at the time, mental and physical condition, along about the 18th and 19th of March, 1912?

A. Bad.

Q. What was your condition on the 20th?

A. Worse.

Q. It is a fact, isn't it, that you were taken ill on or about the 20th and taken to your bed?

A. The 19th.

(Testimony of Fielding J. Stilson.)

Q. Out of your head? A. Practically, yes.

Q. How long?

A. For some little time, for four or five days.

Q. You were ill for how long?

A. Ten or twelve, that is around the house, not well probably for some six months.

Q. It was some months before you entirely recovered? A. Several before I was myself again.

Q. You have in your recitals that occurred on the 18th and 19th and 16th of March, 1912, *have* stated according to your best recollection the things that occurred? A. Yes.

Q. Now, your recollection of this event is not as clear as it might be, isn't it somewhat doubtful on some of the points? [157]

Mr. CRAIG.—I think that is an unfair question, I object to it as incompetent, irrelevant and immaterial, unless the witness is directed to certain conversations. The question might well be answered yes by anybody.

The SPECIAL MASTER.—Mr. Craig, that may be true if it went over a long period of time. I don't think they should be precluded from asking that as a general question.

Mr. TULLER.—You can answer that, yes or no.

A. Yes.

Q. What was the answer?

The SPECIAL MASTER.—Read the question.

Question read by reporter.

A. On some points, yes.

Q. Isn't your recollection somewhat doubtful on the recitals of the statements you stated this morn-

(Testimony of Fielding J. Stilson.)

ing that you made to Mr. Jardine?

A. I believe not, no.

Q. Is it clearer on this than on other matters, or do they stand on the same basis?

A. Clearer on those.

Q. Are you able to state the date on which you purchased the stock from the Staats Company?

A. The 15th of March, 1912.

Q. What information refreshed your recollection?

A. I made the arrangement to buy it on the 14th. I gave the check on the 15th.

Q. What has refreshed your recollection on which you have changed your statement since this morning that it was the 12th or the 13th?

A. An observation of the check.

Q. Your statement now is based on the check and not on your independent recollection, is that correct?

[158]

A. The date of the check corrected in my memory the transaction.

Q. Do you remember the amount you paid per share for that stock?

A. It was between sixty and sixty-two dollars per share.

Q. And are you quite positive of the statement which you made positively this morning that the note which was executed was to cover the price of the stock actually delivered to you, plus certain charges of the Title Insurance & Trust Company?

A. I believe that is correct.

Q. You are just as positive of that, are you as you

(Testimony of Fielding J. Stilson.)

are of any of the other matters? A. Yes.

Q. Now, Mr. Stilson, isn't it a fact that the price of that stock was actually \$64.50 a share?

A. I will admit that, Mr. Tuller.

Q. I don't want you to admit that. Now then, you got sixty shares of stock, didn't you, actually delivered to you? A. Yes.

Q. Now, then, 60 shares at \$64.50 makes \$3,870.00? I will ask you to figure it out to be sure.

A. Yes.

Q. Now, then, are you just as sure as you were when you executed the note for \$3,870.00, that it was the amount of the shares actually delivered to you, including costs?

A. That was my recollection at the time.

Q. You think now that you are mistaken?

A. I do.

Q. Don't you think it possible that in view of the mistake about those two matters, the price of the stock and what that note covered, don't you think it possible you were mistaken about some of the things you recall as having told Mr. Jardine?

A. Possible, not probable.

Q. Is it possible?

A. Anything is possible. [159]

Q. At the time you gave that check to Mr. Jardine did you know you didn't have money in the bank to pay it?

A. I may have had it; I had money, large balances in the bank.

Q. When you gave the check did you expect it to

(Testimony of Fielding J. Stilson.)

be paid? A. Absolutely, yes.

Q. When you gave these other checks that you referred to, did you expect them to be paid?

A. I did.

Q. Did you consider at the time you gave that check that you were insolvent?

A. Absolutely, no. Did you say solvent or insolvent?

Q. Insolvent? A. No.

Q. Isn't it a fact that after the check had been returned, this Staats check, and you had the conversations about the matter with Mr. Jardine, isn't it a fact that you asked him as to,—offered him as collateral security stock of the Fielding J. Stilson Company and represented to him that the stock was good and that the company was solvent?

A. Possible, but I have no recollection of offering the stock.

Q. Isn't it a fact that after the check had come back you told Mr. Jardine that the Fielding J. Stilson Company was solvent, had a great deal of property, and it was simply some money that had not come in and would be in in the course of a few days?

A. I did.

Q. Do you recall, Mr. Stilson, the fact that on certain occasions prior to this there had been checks of yours returned to Mr. Staats which you asked him to hold up, and in each case they had always been made good? A. Always did. [160]

Q. And as a matter of fact it is true, isn't it, Mr. Stilson, that in the brokerage business, where brokerage firms are handling considerable quantities

(Testimony of Fielding J. Stilson.)

of securities, that it not infrequently happens that another broker will ask you to hold over a check?

A. I have done it for the biggest concerns.

Q. It is a matter of frequent occurrence?

A. I cannot answer.

Q. It has happened, you say, frequently, and you yourself have asked this favor and have extended it to others?

A. Both ways.

Q. Now, when you testified, Mr. Stilson, the other day that the company had incurred no new obligations after the 19th of March, were you testifying of your own knowledge, considering the fact that you were out of the line of business for ten or twelve days at least after the 19th of March, weren't you basing that, at least during that period, on hearsay?

A. On hearsay, yes.

Mr. TULLER.—Your Honor, it may be that I will want to ask some further questions,—one other thing—

Q. This is the check which you executed to the William R. Staats Company?

(Counsel produces document.)

A. Yes.

Mr. TULLER.—I will offer this in evidence as defendant's exhibit.

The SPECIAL MASTER.—Defendant's Exhibit 1.

Mr. TULLER.—I would like the privilege of a little further cross-examination if I may have that at some future time?

(Testimony of Fielding J. Stilson.)

Redirect Examination.

(By Mr. CRAIG.)

Q. Mr. Stilson how many times have you requested the Staats Company to hold up your checks prior to the 19th? [161]

A. Two or three times.

Q. How many days have they held it up?

A. Not over two or three days at the outside.

Q. Did they on any former occasion know that any other checks of yours had been turned down for want of funds? A. I had none.

Q. Then they had no such knowledge before?

A. Not to my knowledge.

Q. Did they ever on any occasion prior to that time ever ask you for security for a check which had been turned down for lack of funds?

A. They did not.

Q. Is this the only occasion where they asked you to secure your bad check? A. It is.

Mr. CRAIG.—That is all.

Recross-examination.

(By Mr. TULLER.)

Q. Are you quite sure that you hold Mr. Jardine at any time before the execution of the trust deed that the Stilson Comany was insolvent and that you could not meet your obligations?

A. I emphatically told him that I could not meet checks that were out in addition to his.

Q. Are you sure you told him there were other checks out? A. I am.

Q. It is a fact that whatever else you told him, you

(Testimony of Fielding J. Stilson.)

did tell him that the company itself was solvent and that you had sufficient to meet your obligations?

A. Yes.

Mr. TULLER.—That is all.

Mr. CRAIG.—I will call Mr. J. A. Craig. [162]

[Testimony of J. A. Craig, for Plaintiff.]

J. A. CRAIG, a witness produced on behalf of complainant, being first duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. CRAIG.)

Q. What is your name?

A. James A. Craig.

Q. Where do you reside?

A. 441 Centennial Street, Los Angeles.

Q. How long have you lived in this city?

A. Twenty-nine years. I have lived there twenty-nine years.

Q. What is your business?

A. Real estate business.

Q. How long have you been in the real estate?

A. About eight years.

Q. Centennial Street, where you have resided for 29 years is in the vicinity of the property of the Fielding J. Stilson Company? A. Yes.

Q. Are you familiar with that property?

A. Yes, sir.

Q. Have you bought and sold real property in the vicinity of the property described in the schedules in bankruptcy in this case? A. Yes, sir.

Q. Do you know the value of the, of property, of

(Testimony of J. A. Craig.)

the property described in the schedules in this case?

A. I think I do, sir.

Q. Have you examined all of the properties—

A. Yes, sir.

Q. — set forth in the schedules in the case?

A. Yes, sir. [163]

Q. Can you testify what the reasonable market value of that property was on the 19th day of March, 1912? A. Yes, sir.

Q. You testified in this matter on the—as to the values of this property at the trial of the involuntary petition in bankruptcy in this case, did you not?

A. Yes, sir.

Q. Had you examined those properties in 1912 prior to the date of the adjudication?

A. Yes, sir.

Q. You stated that you have valued every piece of property set forth in the schedules in this matter?

A. Yes, sir.

Q. What was the value of all of that real property on the 19th day of March, 1912?

Mr. TULLER.—I object to that question, your Honor, as a lump valuation of this property.

The SPECIAL MASTER.—You can go into it in cross-examination, save time, Mr. Tuller.

A. You mean the total of everything?

Q. (By the SPECIAL MASTER.) All that was scheduled there?

Q. The real estate scheduled here does not include the home property of Mrs. Stilson, and if you have the valuation of that property I want you to omit it?

(Testimony of J. A. Craig.)

A. Well, the value of the real estate in the Angeleno Heights District was \$185,850.00, outside of the Homestead property of Mrs. Stilson and Fielding J. Stilson; the San Julien property down near fifth was valued at \$36,000.00; the lot in San Gabriel valued \$100.00.

Q. Did that \$185,000 include the home place?

A. No, sir. [164]

Mr. CRAIG.—Take the witness.

Cross-examination.

(By Mr. TULLER.)

Q. You are a brother of Mr. Craig, the attorney for plaintiff in this case? A. Yes, sir.

Q. At whose request did you examine this property?

A. I was asked by Mr. Craig and a list of the property was submitted to me. I have forgotten where I got that list from but I went to work on it.

Q. Is the appraisement that you are making an appraisement of the properties given you in that list? A. Yes.

Q. Have you that list with you?

A. No, that list was turned in here, if I remember. I had some lists and maps.

Mr. TULLER.—Have you the list, Mr. Craig, on which your brother worked?

Mr. CRAIG.—Do you mean this last time?

Mr. TULLER.—No, the first time.

Mr. CRAIG.—No, the list that he worked from the first time was misplaced, and, Mr. Tuller, the last time the list was taken from the schedules a few days

(Testimony of J. A. Craig.)

ago and he was instructed to go over it.

Q. Have you made two appraisements?

A. No, this was a copy of the first.

Q. The list referred to as given you a few days ago, you haven't gone out and examined it?

A. No.

Q. So that what you are testifying to now is a memorandum made from the time you went out the first time you examined the property?

A. Yes, sir. [165]

Mr. TULLER.—I move to strike out all of the witness's examination until the list referred to shows that the property is in issue.

The SPECIAL MASTER.—Motion denied.

Redirect Examination.

(By Mr. CRAIG.)

Q. I asked you if that figure you gave was a figure including that property out there,—now, I call your attention to your figures here, that you have reversed the figures, instead of 185 it is 158 thousand?

A. I notice that is right.

Q. Then, the figure you gave a while ago of 185,000 is incorrect? A. Yes, sir.

Q. What is the correct figure?

A. \$158,850.00.

Q. That is the property outside of the home property, the San Julien and the \$100.00 lot?

A. Yes, sir. Yes, \$158,850.00, I reversed it in carrying it forward.

Mr. TULLER.—No further questions.

Mr. CRAIG.—I intend to call Mr. Carroll Stilson.

(Testimony of J. A. Craig.)

The only thing I am going to ask him about is the conversation that occurred at the final meeting as to where those papers were signed up.

Mr. TULLER.—Are you through, then?

Mr. CRAIG.—Unless you want the expert book-keeper here.

Mr. TULLER.—You already have testimony in that the debts were between two hundred fifty and two hundred and sixty thousand dollars, and I don't know how we are going to disprove it, also I don't like to concede it.

Mr. CRAIG.—I believe that that testimony of Mr. Stilson's was material testimony, but I don't want to have the question made on that subject hereafter when we are able to prove that that is the valuation.
[166]

[Testimony of Carroll J. Stilson, for Plaintiff.]

CARROLL A. STILSON, a witness produced on behalf of the complainant, being first duly cautioned and solemnly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. CRAIG.)

Q. What is your name? A. Carroll A. Stilson.

Q. Mr. Stilson, were you an officer of the Fielding J. Stilson Company in March, 1912? A. I was.

Q. What officer? A. Secretary.

Q. Do you remember when the Fielding J. Stilson Company executed a note and trust deed to the Staats Company? A. I do.

Q. Had you any conversation with any officer of

(Testimony of Carroll A. Stilson.)

the Staats Company prior to the time of the execution of this instrument?

A. In regard to the matter in hand?

Q. Yes, sir, in regard to the execution of the security for the notes? A. No, I don't remember.

Q. Did you have any talk with any officer of that company with relation to the check given to the Staats Company and which went back for lack of funds? A. No, I don't remember of it.

Q. Were you present when the note and trust deed were executed?

A. I was present part of the time, yes.

Q. Where were those instruments signed?

A. To the best of my recollection it was in the office of the Staats Company. I remember of seeing them there and I remember [167] my brother going over them with Mr. Coggeshall in the office of the Staats Company, the seal of the corporation was placed on the instrument.

Q. Who placed it there?

A. My brother placed it there, if my recollection is correct.

Q. Do you remember how the seal got from the office of the Fielding J. Stilson Company to the office of the Staats Company?

A. I think I remember the incident. I think it was carried over there by my brother.

Q. Were you present at any conversation that occurred at the time the instruments were signed?

A. I remember that my brother and Mr. Coggeshall had been out to look at the property in question,

(Testimony of Carroll A. Stilson.)

and they were going over the papers in the office of the Staats Company there, and I believe it was mutually agreed that they were drawn up correctly.

Q. As secretary of the corporation were you ever called upon to deliver to the Staats Company any resolutions authorizing the execution of these instruments?

Mr. TULLER.—Objected to as irrelevant and immaterial.

The SPECIAL MASTER.—Objection sustained.

Mr. CRAIG.—The question was whether he was called upon to deliver any resolutions. I submit that as a very important consideration. People who are getting security for a loan are not securing \$3,850.00 without some evidence delivered to them that there is authority for the officers to execute the instruments. It is a circumstance to show the hurry with which this thing was done.

The SPECIAL MASTER.—You may answer the question subject to the objection. The objection will be sustained.

Mr. TULLER.—The signing by the officers and the seal of the corporation is *prima facie* evidence of the execution of it.

Mr. CRAIG.—I venture to say that no lawyer would take the seal of a corporation as proof that the board of directors had authorized the execution of a note. [168]

Mr. TULLER.—The general manager does not need any authority to execute an instrument.

(Testimony of Carroll A. Stilson.)

A. No, I don't think any demand was made to my knowledge.

Q. Was any question asked you as secretary of the corporation as to the authority of yourself and your brother to execute the note, by anybody connected with the Staats Company?

Mr. TULLER.—Same objection.

The SPECIAL MASTER.—Same ruling. Answer the question, subject to the objection.

A. No, I don't remember now.

Q. You were present at the time that the note and trust deed were delivered, were you?

A. Well, practically so; I saw it in the hands of Mr. Coggeshall. That was in the office of the Staats Company and my brother was present on the date in which—

Q. How did you as secretary of this corporation come to sign the promissory note and trust deed to the Staats Company?

Mr. TULLER.—Objected to as irrelevant, immaterial and incompetent.

Mr. CRAIG.—I think I am entitled to know what—

Mr. TULLER.—This suit is simply that a preference was created. That is the only question, I believe.

Mr. CRAIG.—Suppose that this witness testifies that he did this because his brother told him to.

Mr. TULLER.—That hasn't anything to do with the preference. Question read by reporter.

A. Well, we had always been very friendly with

(Testimony of Carroll A. Stilson.)

the Staats people. They had done a number of favors for us and we simply wanted to protect them.

Q. At whose request did you sign the note and trust deed?

Mr. TULLER.—Same objection.

The SPECIAL MASTER.—Objection overruled.
[169]

A. At my brother's request.

Mr. CRAIG.—That is all.

Mr. TULLER.—No questions.

Mr. CRAIG.—That is all with the exception, of course, of the proof of the liabilities of this corporation.

The SPECIAL MASTER.—When we get through if there is any proof that goes to that on the party defendant, you will have to have Mr. Palethorpe here, or we will arrange it at that time.

Mr. TULLER.—This morning there was something about a seat in the stock exchange to be connected. I now move to strike that out. You may recall that some time, subsequent to the 20th of March, Mr. Fielding J. Stilson was suspended from the Stock Exchange.

The SPECIAL MASTER.—It is immaterial. Motion granted.

[Testimony of John Earl Jardine, for Defendant.]

JOHN EARL JARDINE, a witness produced on behalf of defendant being first duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

(Testimony of John Earl Jardine.)

Direct Examination.

(By Mr. TULLER.)

Q. Your name? A. John Earl Jardine.

Q. Occupation?

A. Vice-president of the William R. Staats Company.

Q. Did you so occupy and hold that position in March, 1912? A. I was, yes.

Q. I will ask you to state the transactions between the firm of William R. Staats Company and the Fielding J. Stilson Company out of which this transaction arises, what you know about it?

A. This particular transaction you refer to?

Q. Yes, sir.

A. On March 15th, 1912, the Fielding J. Stilson Company represented in this case by Mr. Fielding J. Stilson, president, purchased [170] from us through our Mr. Brooks, who handled our stock commission business, 200 shares of Amalgamated Oil stock at \$64.50 a share, making a total of \$12,900.00, which was made in the ordinary course of events, and he gave us a check the same day, as I remember it, drawn on the Citizens' National Bank, in that sum.

Q. I show you Defendant's Exhibit 1 in this case and ask you if that is the check?

(Witness examines document.)

A. That is the check, yes.

Mr. TULLER.—By the way, let me interrupt just a minute. At the time the answer was filed I didn't fill in the number of shares and the price, I was in

(Testimony of John Earl Jardine.)

such a hurry to get the answer in. I would like to fill that in in the answer on file if there is no objection.

The SPECIAL MASTER.—The answer is not here. I will get them before you are through.

Mr. CRAIG.—It is inserted in mine.

Mr. TULLER.—It is possible I inserted it later. If not inserted in the original, it may be?

Mr. CRAIG.—Yes, sir.

Q. Proceed.

A. The check was deposited in the usual way through the National Bank of California, one of our depositaries, and on the following day, March 16th, we were called up and advised by the bank that the check had come back to them through the clearing marked insufficient funds. The matter was called to my attention by our cashier and I took the matter up with Mr. Stilson, my recollection is over the telephone. He said, "Just put the check through again and it will be made good." The 16th was Saturday. We advised the bank of the information we had received from Mr. Stilson; therefore, they held the check and it was not charged against our account that day. Monday, the 18th, [171] we instructed the bank to present the check for payment again, and again it came back. Again I took the matter up with Mr. Stilson. He reiterated the fact that the check would be made good so that it was presented for payment the second time.

Q. On what date was that?

A. Monday. My recollection is that it was pre-

(Testimony of John Earl Jardine.)

sented for payment on two different occasions Monday. When it came back the second time I was quite annoyed by it, and I asked Mr. Stilson to come in and talk the matter over with me, and he came in. I said to him, "Now, on several other occasions heretofore we have, as a matter of accommodation to you, carried your checks for two or three days, and we are perfectly willing to do anything of that kind as a matter of accommodation, but I don't like the unbusinesslike way in which you are handling your affairs, and if it is,—and I want to know when this will be paid." He told me that he expected to receive some funds from a real estate transaction, my recollection is \$10,000.00, that he had been disappointed in having the payment made as promptly as he expected, and therefore he might be still further delayed in making this check good. "Well," I said, "What do you want us to do, carry the matter over for you a little longer, we are perfectly willing to do it, perfectly willing to make you a loan to carry the matter over, but when we make loans we are accustomed to being secured in some way. It is against the resolutions adopted by our board of directors to make unsecured loans." My recollection is that that conversation took place on the 18th. On the 19th, the morning of the 19th, I had another conversation with him and he then said that he would agree to our proposition of making a temporary loan to take care of this matter. It was on the 19th that the check in question was charged against, charged back against our account at the bank. In making the

(Testimony of John Earl Jardine.)

original delivery of the 200 shares of stock to the Stilson Company the delivery was made in the [172] shape of a certificate for 60 shares of actual stock and what is known in brokers' parlance as a due bill for 140 shares. Thereafter, on the 19th, when we made the agreement as to this temporary adjustment of this matter, it was agreed that as the stock, the actual stock had not been delivered to Mr. Stilson on this due bill, that that—that the note, or that the loan that we would make them should be on the basis of the sale price of the 60 shares of stock at \$64.50, amounting to \$3,870.00. As we both considered it only a temporary matter, it was agreed that the loan should be a one day loan. When the matter of collateral came up, Mr. Stilson said, well now, I can give you some stock of the Fielding J. Stilson Company which is good collateral, and I said, "Fielding, we are not in the habit of loaning on stock of a close corporation such as yours. The only two types of collateral that we loan on are listed securities, listed on stock exchanges or bonds, municipal or corporation, or real property." "Well," he says, "I have got plenty, that is, the Fielding J. Stilson Company, has plenty of real property, and we will give you a deed of trust on some of our real property." That was agreeable to me and I asked Mr. Stilson during those conversations the point-blank question as to the kind of shape his company was in. "Why," he says, "we are in good shape, everything is all right; we have got a large amount of property out there which is worth at least a quarter of a mil-

(Testimony of John Earl Jardine.)

lion dollars and our liabilities at the outside are," my recollection is, "not over a hundred and fifty thousand dollars." He impressed it on my mind in the very strongest manner as to the substantiability of his corporation.

Mr. CRAIG.—I have allowed Mr. Jardine to go on and on—

The SPECIAL MASTER.—From the word "impressed" will be stricken out.

Q. State what he said? [173]

A. He told me that his corporation was in sound shape and had assets largely in real property very much in excess of its total liabilities. After arriving at this tentative understanding as to the method of our making him this loan and the way it was to be secured, I told him that our Mr. Coggeshall, the assistant treasurer of our corporation, would go out with him and look over some of his properties, and they would agree together as to what properties should be placed in this deed of trust to secure his loan. At that point I referred the matter of the appraisal of this property to Mr. Coggeshall and he went out with Mr. Stilson and looked at that right after lunch. They got back and Mr. Coggeshall showed me a list of some properties which he said he considered sufficient for our purposes, and I said that if that was his judgment it was satisfactory to me, we would make the loan on that basis and asked him to close up the details of the transaction. That is all that I had to do with it. Mr. Coggeshall handled the matter during that afternoon and the pap-

(Testimony of John Earl Jardine.)

ers were drawn and executed; the deed of trust was recorded.

Q. Do you know the market value of Amalgamated Oil stock on the 15th of March, 1912?

A. The market value was practically the price at which the stock changed hands on that day. Of course, sometimes the stock will sell for a certain price in the morning and for a higher price in the afternoon, or *vica versa*, but that was substantially the market.

Q. Did it increase or decrease after that time?

A. Increase.

Q. I will ask you if at any time prior to the execution of this deed of trust you were told by Mr. Stilson or anyone that the Fielding J. Stilson Company had any other checks other than yours which had been dishonored?

A. I have no such recollection. [174]

Q. Did you know of any other checks, other than yours, being dishonored? A. No.

Q. I will ask you if you ever had any conversations or made any inquiries of anyone prior to this time as to the financial condition of the Fielding J. Stilson Company, and if so, state of whom you inquired and when?

Mr. CRAIG.—I think that is immaterial and incompetent.

The SPECIAL MASTER.—Objection sustained.

Mr. TULLER.—There is an allegation here that this corporation was insolvent—on the question of our good faith I wish to show that they had made inquiries.

(Testimony of John Earl Jardine.)

The SPECIAL MASTER.—You may put in the proof subject to the objection. The reason I sustained the objection is this, if you had reasonable cause to believe, then you had something which would put you on inquiry; if you had any cause to believe, and any reason to be put on inquiry, you are chargeable with everything that your inquiry would disclose.

Mr. TULLER.—Does your Honor rule that the words “reasonable cause to believe” are—

Mr. CRAIG.—I want to add to that objection that any testimony that may be given along the line that is now started by Mr. Tuller to bring out would be hearsay.

The SPECIAL MASTER.—Save an exception.

Question read by reporter.

A. I made two such inquiries. My recollection is that those inquiries were made within about six months before this happened. They were made on the occasion that Mr. Stilson first asked us to hold over a check of the Fielding J. Stilson Company, or it was a check which came back and had to be presented again, one or the other of those circumstances. I took the matter up with Mr. Stoddard Jess, vice-president of the First National Bank and Mr. R. R. Rogers, vice-president of the National Bank of California, and [175] asked those gentlemen what they knew about the Fielding J. Stilson Company's financial responsibility and business methods. The answer was almost identical in each case that they considered the Fielding J. Stilson Company and Mr.

(Testimony of John Earl Jardine.)

Stilson himself perfectly good and responsible financially but they thought he was somewhat careless in his business methods. I remember Mr. Rogers, for instance, stating that they would be quite likely to have checks more than sufficient to take care of his bank balance lying on his desk and fail to send them in for deposit owing to his not having good organization. On two or three different occasions we extended to the Fielding J. Stilson Company the favor of holding over checks two or three days.

Q. I will ask you if there had been instances both where you had been asked to hold them over and checks that had been dishonored, I mean checks of the Stilson Company?

A. I cannot state positively that both circumstances prevailed, but I rather think they did.

Q. Prior to this did they ever fail to pay it in full?

A. No, they did not.

Q. I will ask you what was the reputation of the Fielding J. Stilson Company in the Stock Exchange as to its financial responsibility?

Mr. CRAIG.—Incompetent and immaterial, and calling for an opinion of somebody else, and no proper foundation laid for it.

Mr. TULLER.—I submit that it is very important, the reputation—

The SPECIAL MASTER.—You may save the point.

Question read by reporter.

Q. I will amend that, "on the Stock Exchange and in financial circles?"

(Testimony of John Earl Jardine.)

A. The financial standing was good.

Q. Now, at the time you took this deed of trust, or at any time prior thereto, did you know that the Fielding J. Stilson Company was insolvent?

[176]

Mr. CRAIG.—I object to it as immaterial and incompetent; not the proper way to prove the question.

Mr. TULLER.—He alleged that they knew of it; I don't know of any better way of proving it.

The SPECIAL MASTER.—You may answer the question.

Q. Did you find it to be solvent?

Mr. CRAIG.—Same objection.

The SPECIAL MASTER.—Objection sustained. I am going to sustain both objections. Answer the question.

Question read by reporter.

A. I *certain* did not.

Mr. TULLER.—I believe that is all.

Cross-examination.

(By Mr. CRAIG.)

Q. Mr. Jardine, you received a check from Mr. Stilson for \$12,000.00, which was in payment of 200 shares of Amalgamated Oil Company, at \$64.50, did you not?

Mr. TULLER.—The exact amount is \$12,900.00.

Q. Which was received by your company; that was for stock which was sold to him as a broker, was it not?

Mr. TULLER.—I don't know just what the question means, if you will explain it I may not object to it. If he means with relation to other persons,

(Testimony of John Earl Jardine.)

of course I will object to it.

The SPECIAL MASTER.—Objection sustained.

Q. You knew that Mr. Stilson was a stock broker, did you not?

A. I knew that he was a stock broker. We had no knowledge,—as to what, in what particular connection he bought this stock. Brokers buy stock for other companies.

Q. You don't know, then, whether he was buying this stock for his own account or buying it as a broker? A. No way of knowing it. [177]

Q. What was this so-called due bill for 140 shares?

Mr. TULLER.—There again, if it means the terms of it, I object to it.

The SPECIAL MASTER.—He has testified that there was a due bill given; objection overruled.

Mr. TULLER.—The question, as I understand, asks for a recital of the due bill.

Mr. CRAIG.—I want the record to show what the due bill is.

Mr. TULLER.—I object to the witness testifying as to any other thing than the terms of the due bill.

Q. (By the SPECIAL MASTER.) State the terms, the language?

A. My recollection of the language of the due bill is as follows: "Due Fielding J. Stilson Company 140 shares of Amalgamated Oil," simply a memorandum given him with the shares of stock actually given to show that in lieu of the other 140 shares—

Q. Did you know that this 140 shares of stock had been used as collateral by Mr. Stilson before the check went bad?

(Testimony of John Earl Jardine.)

Mr. TULLER.—Objected to as irrelevant and immaterial. I think I will withdraw that.

The SPECIAL MASTER.—The 140 shares due bill had been given to Lateau. He testified this morning that prior to the giving of the trust deed he had given it to Lateau.

A. I heard of it at some time, but my recollection is I didn't know of it prior to the trust deed. I would not say that positively.

Q. Mr. Jardine, do you mean to say that when this \$12,000.00 check went bad you didn't know that Mr. Stilson had used the entire 200 shares of Amalgamated Oil?

Mr. TULLER.—I object to that.

A. I did not.

Q. When you took this \$3,870.00 trust deed what discussion was there between you as to the balance of the twelve thousand dollars? [178]

A. Merely this arrangement, that as between us the 140 shares had not been delivered to him, therefore, as between us, that matter was as it were in abeyance.

Q. What do you mean by abeyance, what was said between you and him?

A. I cannot recollect the exact language but it was equivalent to the transaction being canceled.

Q. Did you get any writing from him cancelling the 140 due bill?

A. As between brokers it is not—

Q. Answer the question. A. No.

Q. Was there any written evidence whatever with relation to delivering the 140 shares of stock?

(Testimony of John Earl Jardine.)

A. Verbal agreement.

Q. Was there a verbal agreement at that time?

Mr. TULLER.—Objected to as incompetent, irrelevant and immaterial in this case.

The SPECIAL MASTER.—Objection overruled.

A. That is my recollection.

Q. What do you mean by, that is your recollection?

A. That is my recollection, there was such an agreement.

Q. You mean there might or might not have been?

A. My recollection is there was.

Q. You are not positive about it?

A. That is my best recollection.

Q. When did you first learn this 140 shares had been used by Mr. Stilson?

Mr. TULLER.—Objected to as irrelevant and immaterial and not bearing on this case.

The SPECIAL MASTER.—If it was subsequent to the 19th of March—

Mr. CRAIG.—That is what I want to know, if it was prior or subsequent. [179]

The SPECIAL MASTER.—You can answer the question.

A. What was the question?

Q. (By SPECIAL MASTER.) When was it, prior or subsequent to the 19th of March, that you heard that the due bill had been hypothecated?

A. I had no knowledge what he did with the stock.

Q. (By the SPECIAL MASTER.) That isn't the question. The question is, when did you hear,

(Testimony of John Earl Jardine.)

either subsequent—when did you first hear, either subsequent or prior to the 19th of March that the due bill had been hypothecated?

A. I cannot tell you that, I cannot tell you when I did know.

Q. Where was this 200 shares purchased from you, on the stock exchange?

Mr. TULLER.—Objected to as immaterial; do you mean the transaction whereby Stilson purchased?

Mr. CRAIG.—Yes.

Mr. TULLER.—No objection.

A. The transaction was handled by our Mr. Brooks. The details as to where the transaction was consummated I was not entirely cognizant with.

Q. Who is your Mr. Brooks?

A. He represents us on the Los Angeles Stock Exchange and handles our stock commission business. He occupies the position of clerk for me as member of the Los Angeles Stock Exchange.

Q. You were not on the Exchange that morning that the purchase was made? A. No, sir.

Q. Mr. Brooks was acting for you that day?

A. Yes, sir.

Q. Is your company in the habit, Mr. Jardine, of loaning money on real estate on second mortgage?

Mr. TULLER.—Objected to as incompetent, irrelevant and immaterial. [180]

The SPECIAL MASTER.—Why isn't that proper cross-examination?

Mr. TULLER.—And not proper cross-examination.

(Testimony of John Earl Jardine.)

The SPECIAL MASTER.—They didn't ask that.

Mr. CRAIG.—Yes, they did.

The SPECIAL MASTER.—Isn't it proper cross-examination? Objection overruled.

A. We have done so.

Q. How frequently?

Mr. TULLER.—Same objection to all this line.

A. Shall I—well, I could not say how frequently, I have one case in mind where we made a loan of \$4,000.00, and as a matter of accommodation to him, pure and simple, we took a second mortgage on some property of his, but we considered the equity perfectly good.

Q. Was that in 1912 or before that time?

A. That same year, I think it was.

Q. Was your corporation in the habit of loaning its money on second mortgage real estate security without a certificate or an abstract of title?

Mr. TULLER.—Same objection.

The SPECIAL MASTER.—That objection will be sustained; no testimony in reference to that.

Q. I will ask you whether or not the William R. Staats Company, at the time of loaning this money requested a certificate or abstract of title, or obtained one?

Mr. TULLER.—Same objection.

The SPECIAL MASTER.—Objection overruled.

A. As to whether a certificate of title was requested, I cannot state as the details were turned over by me to Mr. Coggeshall. I will say, however, that as we regarded the matter as purely a tem-

(Testimony of John Earl Jardine.)

porary one, if the matter had been referred to me I would not have insisted upon it. The note was a one-day note. [181]

Q. Then, as I understand you, you didn't receive any abstract or certificate of title?

Mr. TULLER.—Same objection.

The SPECIAL MASTER.—Same ruling.

A. My recollection is we didn't.

Q. Is your company in the habit of loaning money on a second mortgage without a certificate or abstract of title?

Mr. TULLER.—Same objection.

The SPECIAL MASTER.—Objection overruled.

A. I answered that we had loaned money without that.

Q. Answer my question, yes or no.

Q. (By the SPECIAL MASTER.) Are you in the habit of making such loans without a certificate of title? A. I cannot answer yes or no.

Q. Did you ever make a loan on a second mortgage without an abstract of title?

A. I cannot answer that.

Q. Why?

A. Because the history of the company goes back 30 years.

Q. Well, then, in 1912, or the year prior to that time?

Q. (By the SPECIAL MASTER.) Did your company ever make a loan secured by a second mortgage on property without a certificate of title during 1912 or '11?

(Testimony of John Earl Jardine.)

A. The loan that I mentioned before was one made in 1912 on second mortgage; I am not positive whether we got a certificate of title with it or not.

Q. Outside of that one you can say that your company did not make any loans without a certificate of title? A. I cannot say.

Q. (By the SPECIAL MASTER.) Of your own knowledge?

A. I cannot state that positively, impossible for me to state. [182]

Q. Do you know of your own knowledge?

Mr. TULLER.—This is all subject to the same objection.

Q. (By the SPECIAL MASTER.) Do you know of your own knowledge, did they ever make such a loan without a certificate of title?

A. Not to my knowledge.

Q. Why, Mr. Jardine, was it that if you regarded the Fielding J. Stilson Company as solvent and as being able to meet its obligations, as you have testified, that you insisted upon that \$3,870.00 being secured by a note payable one day after date, explain that?

A. Because we did not make unsecured loans, and it is against the resolutions of the board of directors that we make unsecured loans.

Q. Didn't you make loans unsecured?

A. What do you mean?

Q. How many days did you carry checks?

A. Unsecured?

Q. Yes? A. We didn't make unsecured loans.

(Testimony of John Earl Jardine.)

Q. I refer to checks that are turned down or returned for insufficient funds?

A. I don't quite understand.

Q. How long did you hold those?

Mr. TULLER.—Objected to as irrelevant and immaterial and not cross-examination.

The SPECIAL MASTER.—Objection sustained.

Q. Isn't it a fact that you held the Fielding J. Stilson Company's checks for a longer period than three days on former occasions without asking for security? A. No.

Q. How long had you held them?

A. My recollection is not over, in any case, three days, if anything, two days. [183]

Q. Mr. Jardine, do you mean to testify that you didn't know that the Fielding J. Stilson Company was in financial difficulties at the time that this check was returned to you?

A. When the check was returned to us?

Q. Yes? A. No, I did not.

Q. Do you mean to testify that you didn't read in the public print of this city, prior to the 19th day of March, 1912, the fact that the Fielding J. Stilson Company was in financial difficulty?

A. I did not.

Q. Will you swear that it was not known throughout the Stock Exchange that the Fielding J. Stilson Company was about to be suspended?

A. I didn't know of that.

Q. Will you testify that up to the time of the return of the check that you didn't know that they

(Testimony of John Earl Jardine.)

were in financial difficulty?

A. I had no knowledge of their being in financial difficulties.

Q. Why, he—now, after the return of that check and before the 19th of March, do you mean to swear that you had no knowledge outside of the fact that your check had been returned, that the Fielding J. Stilson Company was in financial difficulties?

Mr. TULLER.—I object to that.

The SPECIAL MASTER.—Objection overruled.

Q. Up to the time of their—

Q. (By the SPECIAL MASTER.) Up to the time of the making of the trust deed?

A. Mr. Stilson told me in our conversation that he had other matters which he had satisfactorily taken care of in other ways.

Q. Is that your answer to my question?

A. Yes.

Mr. CRAIG.—Will you please read that question? I want you to answer. [184]

Question by reporter as follows: “Now, after the return of that check and before the 19th of March, do you mean to swear that you had no knowledge outside of the fact that your check had been returned, that the Fielding J. Stilson Company was in financial difficulties?”

A. I don't know of any other way that I can answer it.

Q. (By the SPECIAL MASTER.) Had you any knowledge of it by the public press, rumors on the Stock Exchange prior to the giving of the trust

(Testimony of John Earl Jardine.)

deed, except your own dealings?

A. Except my own dealings, and in the course of the conversations with Mr. Stilson he told me that he had some other matters due some other people and that he had adjusted those matters by,—had taken care of them by giving these people notes.

Q. Well, then, he did tell you that he had other checks that had been turned down? A. No.

Mr. TULLER.—That is not what he testified to at all. He simply told you he had other matters.

Q. Outside of the dealings with Fielding is that the only knowledge you had that the Fielding J. Stilson Company was in financial difficulty?

A. That is my recollection.

Q. You won't swear that that is so? Do you read the newspapers? A. I try to.

Q. You remember, don't you, that the public prints of Los Angeles were all of them full of the difficulties of the Fielding J. Stilson Company?

Mr. TULLER.—I object to counsel stating what was in the papers; no foundation laid.

The SPECIAL MASTER.—The question is whether the witness knows of any such publication.

[185]

A. I am not trying to elude the question. The first time I knew of this was on the 20th of March.

Q. The day after the transaction?

A. Yes, sir.

Q. Did you direct the recording of that trust deed?

A. I can't say that I directed it; it was done as an ordinary matter of business; if I had been asked by

(Testimony of John Earl Jardine.)

Mr. Coggeshall, "Shall I record it," I would say, "Yes, record it."

Q. It was recorded, according to the record, on the 20th day of March, at 9:00 o'clock A. M. You don't know who took care of the recording of it?

A. No, I don't, just a matter of routine in the office.

Q. Do you know how late on the 19th it was given?

A. I do not. That all was in the hands of Mr. Coggeshall.

Q. Weren't you present when it was executed?

A. No, I think not. I have no recollection of seeing it executed.

Q. Had Mr. Brooks, prior to the 19th of March, 1912, informed you of any rumors upon the Stock Exchange with relation to the affairs of the Fielding J. Stilson Company? A. I cannot remember that.

Mr. CRAIG.—That is all.

Mr. TULLER.—I believe no redirect.

[Testimony of J. A. Coggeshall, for Defendant.]

J. A. COGGESHALL, a witness produced on behalf of the defendant, being first duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. TULLER.)

Q. Mr. Coggeshall, why did you not get a certificate of title or abstract showing the title to this property of the [186] Fielding J. Stilson Company on which you took the trust deed?

Mr. CRAIG.—I object to it as calling for the con-

(Testimony of J. A. Coggeshall.)

clusion of the witness; what his reasons or opinion may be are absolutely immaterial and incompetent.

Mr. TULLER.—Counsel has gone into this at some length in the former witness; I now intend to show why it was not done.

The SPECIAL MASTER.—Answer the question. Objection overruled.

A. The papers were drawn at the Title Insurance & Trust Company, and after the note was signed and the trust deed executed the gentleman that handled the escrow asked if we wished a certificate; I told him no, that the loan was only for a few days—

Mr. CRAIG.—I object to the conversation.

The SPECIAL MASTER.—The objection,—the conversation, I think, ought to be stricken out.

Q. Who was present at that time?

A. Mr. Fielding J. Stilson—do you mean at the time—

Q. The time that particular conversation you were about to detail?

A. I know positively that Fielding J. Stilson, the gentleman who handled the escrow, and myself were.

Mr. TULLER.—Under that circumstances, I think the question is material.

The SPECIAL MASTER.—Ask the question.

Q. State what was said in the conversation you were about to detail.

A. After the papers were fully executed the gentleman handling the escrow asked if we wanted a certificate of title. I said, no, it is only a matter of accommodation, will be paid in a few days.

(Testimony of J. A. Coggeshall.)

Q. I will ask you why you didn't require a certificate of title?

Mr. CRAIG.—Objected to as incompetent, irrelevant and immaterial, calling for a conclusion of the witness. [187]

The SPECIAL MASTER.—I think he has already answered. Objection sustained.

Mr. TULLER.—That is all. I would like to take an adjournment. I will have more witnesses here at that time.

The SPECIAL MASTER.—You can go on at 10:00 o'clock to-morrow. [188]

Los Angeles, California, Apr. 28, 1915.

10:00 o'clock A. M.

[Testimony of W. W. Eakins, for Defendant.]

W. W. EAKINS, a witness produced on behalf of the defendant, being first duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. TULLER.)

Q. Please state your name and occupation.

A. W. W. Eakins, appraiser.

Q. Have you had an official relation with the bankruptcy court, or have you acted in any capacity for the bankruptcy court during the last few years?

A. As appraiser.

Q. How long?

A. For a matter of eight or ten years.

Q. In that connection, have you had occasion to pass upon the values of property in the bankruptcy

(Testimony of W. W. Eakins.)

court? A. A great many.

Q. I will ask you if you ever made an appraisement, in or about the month of January, 1913, you made an appraisement of the real estate belonging to the estate of the Fielding J. Stilson Company and listed in the schedules filed by the Fielding J. Stilson Company. A. Yes.

Q. I will ask you to state the value of that real property as you ascertained.

Mr. CRAIG.—I object to it on the ground that no proper foundation has been laid.

Mr. TULLER.—Object to the qualification of the witness to express an opinion?

Mr. CRAIG.—Yse, sir; on this real property. I know Mr. Eakins to [189] be an appraiser, one of the best qualified in Los Angeles as to values generally, but as to this particular real property I don't know his qualifications.

Mr. TULLER.—He testified that he made an appraisement of this property.

Q. Your appraisement was taken for the purpose of values? A. Yes.

Mr. TULLER.—I submit the question.

The SPECIAL MASTER.—Objection overruled.

A. You want to know the value of the whole thing?

Q. Yes. A. The grand total, \$272,125.00.

Q. That memorandum made by you at or about the time?

(Witness examines document)

A. Yes.

Mr. TULLER.—You may cross-examine.

(Testimony of W. W. Eakins.)

Q. One other question, was the value at the time any greater than the value of the same properties in the month of March, 1912?

A. No, about the same.

Mr. TULLER.—You may cross-examine.

Q. One other question, if you will pardon me, did any other persons make an appraisement with you?

A. Oh, yes.

Q. Who were they?

A. G. C. Gray and Mr. Colson.

Q. Do you know Mr. Colson's occupation?

A. Appraiser, both appraisers.

Q. Do you know whether he has any relation with the Security [190] Trust & Savings Bank, the complainant in this case?

Mr. CRAIG.—Objected to as immaterial and incompetent.

The SPECIAL MASTER.—That is immaterial.

Q. I will ask you to state whether or not,—and what is Mr. Gray's business or occupation?

A. Also appraiser.

Q. I will ask you whether those gentlemen also agreed with you on the appraisement?

Mr. CRAIG.—Incompetent and immaterial.

The SPECIAL MASTER.—Objection sustained.

Mr. TULLER.—Subject to the objection I would like that answered.

A. They agreed with me.

Cross-examination.

(By Mr. CRAIG.)

Q. Mr. Eakins, in your appraisement of the prop-

(Testimony of W. W. Eakins.)

erties, and included in the \$272,125.00, isn't it a fact that these lots, being lots 34 to 39, inclusive, in Block 15, Angeleno Heights, upon which was located the house of the mother of Fielding J. Stilson, and also Fielding J. Stilson's own residence appraised at \$31,500.00, the appraisement includes the two houses? A. Yes.

Q. Then, that property is included in the amount of your appraisement? A. Yes.

Q. Of course, you didn't make any investigations, or anything, as to whether that property belonged to the estate or not?

A. No, we never enter into that as a rule. We appraise it and then it is for the trustee to determine whether it belongs or not. [191]

Q. (By the SPECIAL MASTER.) Mr. Eakins, will you look at this list which is filed here on the 14th day of January, 1913, at the same time that the appraisement was filed, and state if that is the list and appraisement of the different valuations of the respective lots that make up this inventory of \$272,125? A. Yes, it is.

Q. (By the SPECIAL MASTER.) Now, what value did you put upon the lots that are included in this trust deed, lot 17, of block 7?

A. \$1,650.00.

Q. (By the SPECIAL MASTER.) Lot 2, block 11? A. \$1,000.00.

Q. (By the SPECIAL MASTER.) Lot 3, block 11? A. \$1,000.00.

Q. (By the SPECIAL MASTER.) 6 in 11?

(Testimony of W. W. Eakins.)

A. \$1,000.00.

Q. (By the SPECIAL MASTER.) 7 in 11?

A. \$1,250.00.

Q. (By the SPECIAL MASTER.) In block 15, lot 66? A. \$1,750.00.

Q. (By the SPECIAL MASTER.) 67?

A. \$1,250.00.

Q. (By the SPECIAL MASTER.) 68?

A. \$2,000.00.

Q. (By the SPECIAL MASTER.) 69?

A. \$1,250.00.

The SPECIAL MASTER.—No, that isn't right; no, 15½ is right, that is all in block 15½.

By the SPECIAL MASTER.—Lot 43, block 16?

A. \$2,000.00.

Q. (By the SPECIAL MASTER.) Lot 5, block 20? A. \$2,250.00.

Q. (By the SPECIAL MASTER.) Lot 3, of 29?

A. \$2,500.00.

Q. (By the SPECIAL MASTER.) 27 of 29?

A. 2,200.00. [192]

By the SPECIAL MASTER.—Lots 1 and 16 in 25?

A. \$3,250.00 for number 1, and \$1,750.00 for 16.

The SPECIAL MASTER.—That is all.

Q. (By Mr. CRAIG.) I desire to ask, Mr. Eakins, whether you know that the trustee elected in 1912 has only been able to sell about \$35,000.00 worth of this property up to the present time?

Mr. TULLER.—Objected to as immaterial and not proper cross-examination.

The SPECIAL MASTER.—You may answer the question, yes or no. A. I don't know.

Mr. TULLER.—Now, won't you stipulate that Mr. Colson and Mr. Gray, the other appraisers appointed by the Court will testify the same as Mr. Eakins? I tried to get Mr. Colson here.

Mr. CRAIG.—I will ask you a few things first, if it is possible to eliminate the bringing of this expert accountant here from San Bernardino to examine the books, if a stipulation that if he were present that he would testify that the liabilities of the concern are as stated in the schedules in bankruptcy, if you will stipulate that if he was present he would testify to that as of the date of the filing of the schedules, I will stipulate those other acts and then with the exception of about five minutes of testimony of Mr. Carroll Stilson—

Mr. TULLER.—I think I will make the stipulation that Mr. Palethorpe if present would testify as stated in his report that is, that the liabilities were taken from the books and from statements taken from Carroll Allen and from Fielding J. Stilson. It isn't fair for you to ask me,—in other words, I am willing for that report to go in and stipulate that he would testify to that report.

The SPECIAL MASTER.—The stipulation is that if the witnesses were here they would testify to those facts on both sides? [193]

Mr. TULLER.—Yes. I won't admit that in evidence as a part of it. The whole report must go in.

The SPECIAL MASTER.—What do you mean by that?

Mr. TULLER.—The report shows a number of things.

The SPECIAL MASTER.—He asks you to admit that if Mr. Palethorpe were here he would testify as to what that report shows as to the liabilities.

Mr. TULLER.—I am not willing to stipulate a part of the report. I want the whole report to go in.

The SPECIAL MASTER.—You want him to stipulate that if Mr. Palethorpe was here he would testify to the rest of the report?

Mr. CRAIG.—Well, of course, I don't know, Mr. Tuller, where these valuations came from that are in this report. Some of these valuations here are impossible values and I don't know where that expert accountant got those values, and I am not willing to stipulate.

The SPECIAL MASTER.—You are not stipulating that they are true. You stipulate that if they were here they would testify to the same thing.

Mr. TULLER.—That is it, exactly.

Mr. CRAIG.—Testify to what, testify as to the values?

The SPECIAL MASTER.—Testify that he got that information and made that report just as he states here.

Mr. CRAIG.—This report contains, with relation to the assets of this concern, not statements of facts, but statements of opinions. The liabilities are statements of facts.

Mr. TULLER.—I can't agree with you on that, because many of those we don't know whether are facts or not.

Mr. CRAIG.—The values of the assets here are mere opinions of somebody not disclosed by the record.

Mr. TULLER.—It shows.

The SPECIAL MASTER.—Mr. Craig—I don't understand that Mr. [194] Palethorpe would give any opinion as to the values himself. He would simply testify that that was the statements made to him from which he made his report. He isn't called as an expert witness on their behalf or cross-examination to arrive at values of the property, but simply the facts that went to make up his report. If you ask him what made up his report of the liabilities, Mr. Tuller on cross-examination will go into the whole subject and in cross-examination will ask him what items went to make up his report as assets, and it would be competent in evidence.

Mr. CRAIG.—I have no doubt but what the items making up the assets are admissible, but so far as the valuation placed upon those—

The SPECIAL MASTER.—I don't understand that if the witness was here he would testify as to the real facts any more than the report itself shows.

Mr. TULLER.—I don't ask you to make that stipulation,

Mr. CRAIG.—I offer in evidence all of the books, papers and memoranda in the office of the Fielding J. Stilson Company now in the hands of the trustee, for the purpose of proving the facts, that the liabilities of the Fielding J. Stilson Company were as stated in the schedules in bankruptcy filed in this matter.

Mr. TULLER.—The offer is too broad and general, showing what all of the books and papers are, by whom made or when, or what the books and papers and memoranda contain.

The SPECIAL MASTER.—Objection sustained.

Mr. CRAIG.—I will not stipulate that this report of the expert accountant made by him go in because those things are not true, and I don't intend to admit them.

The SPECIAL MASTER.—What about those two witnesses? [195]

Mr. CRAIG.—I will admit that if they were present they would testify exactly as Mr. Eakins has already testified, subject to the same objections. Is that satisfactory?

A. Mr. TULLER.—Yes, perfectly.

Mr. CRAIG.—I want to call Mr. Carroll Stilson.

Mr. TULLER.—I am not sure that I brought out from Mr. Eakins that this appraisement was made pursuant to appointment by the bankruptcy court in the matter of the bankruptcy of the Fielding J. Stilson Company, that will be stipulated?

Mr. CRAIG.—Yes, sir.

The SPECIAL MASTER.—Are you through?

Mr. TULLER.—Yes, sir.

Mr. CRAIG.—Mr. Stilson, will you take the stand?

**[Testimony of Carroll A. Stilson, for Plaintiff
(Recalled).]**

CARROLL A. STILLSON, recalled.

Direct Examination (Continued).

(By Mr. CRAIG.)

Q. Your name is Carroll Stilson?

A. Yes, sir.

Q. You have already been sworn in this matter?

A. Yes, sir.

Q. And you testified that you were the secretary of the corporation during the year 1912?

A. Yes.

Q. Your brother testified that he was sick from the 20th day of March, 1912, for some time, do you remember how long? I mean sick so as to be away from business.

A. He was laid up with brain fever for about a week.

Q. Who had charge of the business during his absence? A. I did. [196]

Q. You are familiar with all of the transactions of the company during his absence?

A. Practically no business, everything suspended.

Q. You are familiar with everything that did occur? A. Yes.

Q. Subsequent to the 19th day of March, 1912, was any indebtedness incurred by the company?

Mr. TULLER.—That is callnig for a conclusion of the witness.

Q. Well, was any business transaction entered into by the corporation?

Mr. TULLER.—That is too vague and general.

(Testimony of Carroll A. Stilson.)

The SPECIAL MASTER.—Objection overruled.

A. No, I don't know of any.

Q. Did you buy anything during that time?

A. No, not anything that I know of at all. I am sure not in the way of securities or anything that was pertaining to the business at all.

Q. Was any debt incurred by the corporation after that time?

Mr. TULLER.—Objected to as calling for a conclusion of the witness.

The SPECIAL MASTER.—Objection overruled.

A. No, there was nothing to my knowledge.

Mr. CRAIG.—Take the witness.

Cross-examination.

(By Mr. TULLER.)

Q. Was there anybody else—first, how long was it before your brother Fielding J. came back and took any active part in the business?

A. It was about a week before he came back to the office.

Q. But wasn't it about a week that he was laid up? Did he come back to business in about a week? [197]

A. I should say it was not greater than ten days.

Q. During that period of ten days who else was in the office of the Fielding J. Stilson Company besides yourself? A. Only the office help.

Q. Who were they?

A. The bookkeeper, the stenographer and salesman, one salesman.

Q. Who was that salesman?

A. His name was Ellis.

(Testimony of Carroll A. Stilson.)

Q. Are you able or are you not able, Mr. Stilson, to testify positively as to what Mr. Ellis did or did not do during that period?

A. Well, you mean in so far as business transactions went?

Q. So far as any transaction in or on behalf of or as salesman for the Fielding J. Stilson Company?

A. Well, I certainly would have known had he put through,—I should have known of any transaction that he put through.

Q. The last is your answer, isn't it, that you should have known?

A. Well, I qualify that by saying that I don't believe there was any. Had there been any I would have known it.

Q. Wouldn't it have been possible for Mr. Ellis to do things that you didn't know about?

A. It certainly would not have been possible for him to receive any money to be deposited in the bank without my knowledge.

Q. Wouldn't it have been possible for him to have sold something without your knowledge?

A. It might have been possible for him to sell personal property without my knowledge, that is things that did not need the seal of the corporation or endorsement of checks, without my knowledge.
[198]

Q. That would include such things as ordinary personal property, bonds and negotiable things that would not require endorsement?

A. He did not have access to the safe so I don't

know how he could have done that.

Mr. Craig.—That is the case.

(Check attached, as follows:)

[Exhibit “A”—Check.]

No. 8235.

Fielding J. Stilson Co.

Members Los Angeles Stock Exchange.

115 West Fourth St.

Tel. Main 105 and Home 10261.

Los Angeles, Cal., March 15, 1912.

Pay to the order of Wm. R. Staats & Company
\$12,900.00. Twelve thousand nine hundred and
no/100 Dollars.

NOT OVER FOURTEEN THOUSAND \$14,000\$

FIELDING J. STILSON CO.

FIELDING J. STILSON,

President-Secretary.

To the CITIZENS' NATIONAL BANK, LOS
ANGELES, CAL.

Clearing-house No. 11.

United States Depositary.

[Endorsed]: Pay to the Order of National Bank
of California, Los Angeles, Cal. Wm. R. Staats Co.
U. S. District Court, No. 235—Civil. Exhibit No.
“A.” Filed Apr. 27, 1915. Helm, Referee, Special
Master. The National Bank of California. G. F.
Pickrell. [199]

*In the District Court of the United States, Southern
District of California, Southern Division.*

SECURITY TRUST & SAVINGS BANK, a Corporation, Trustee in Bankruptcy of FIELD-
ING J. STILSON COMPANY, a Corporation,
Bankrupt,

Complainant,

vs.

WM. R. STAATS COMPANY, a Corporation, and
TITLE INSURANCE & TRUST COM-
PANY, a Corporation,

Defendants.

Notice of Appeal.

To O'Melveny, Stevens & Millikin and Walter K. Tuller, Attorneys for Defendants, and to Wm. M. Van Dyke, Esq., Clerk of the District Court of the United States, Southern District of California:

Sirs: PLEASE TAKE NOTICE: That Security Trust & Savings Bank, a corporation, Trustee in bankruptcy of Fielding J. Stilson Company, a corporation, bankrupt, hereby appeals from the minute order entered herein on the 16th day of July, 1915, and from the order signed and filed herein on the 20th day of July, 1915, and from each of said orders, sustaining the exceptions to the report of the Special Master in the above-entitled action, and ordering complainant's bill of complaint herein dismissed, to the Circuit Court of Appeals for the Ninth Circuit to be holden in and for said Circuit at the city and

county of San Francisco, in the State of California.

Dated this 26th day of July, 1915.

Yours, etc.

W. T. CRAIG,
Solicitor for Complainant. [200]

[Endorsed]: Original. No. 235. In United States District Court, Southern District of California, Southern Division. Security Tr. & Sav. Bank, a Corporation, Trustee, Complainant, vs. Wm. R. Staats Company, et al., Defendants. Notice of Appeal. Filed Jul. 26, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Receipt of Copy of the Within is Hereby Admittted this —— day of July 26, 1915. O'Melveny, Stevens & Millikin, Walter K. Tuller, Attorneys for Defts. William T. Craig, Equitable Savings Bank Building, Los Angeles, Cal., Attorney for Complainant. [201]

In the District Court of the United States, Southern District of California, Southern Division.

SECURITY TRUST & SAVINGS BANK, a Corporation, Trustee in Bankruptcy of FIELDING J. STILSON COMPANY, a Corporation, Bankrupt,

Complainant,

vs.

WM. R. STAATS COMPANY, a Corporation, and
TITLE INSURANCE & TRUST COMPANY, a Corporation,

Defendants.

**Petition for Allowance of Appeal and Order
Allowing the Same.**

To the Honorable Judges of the United States
District Court for the Southern District of
California:

Security Trust & Savings Bank, a corporation,
Trustee in bankruptcy of Fielding J. Stilson Com-
pany, a corporation, bankrupt, conceiving itself
aggrieved by the minute order entered on the 16th
day of July, 1915, and by the decree filed and signed
on the 20th day of July, 1915, in the above-entitled
action, and by each of them, sustaining certain ex-
ceptions made to the Special Master's report in said
action, and ordering that complainant's bill of com-
plaint be dismissed, does hereby petition for an
appeal from the said order and decree and from
each of them, to the United States Circuit of Appeals
for the Ninth Circuit, and prays that its appeal
may be allowed and a citation granted directed to
the said Wm. R. Staats Company, a corporation, and
Title Insurance & Trust Company, a corporation,
commanding them to appear before the United
States Circuit Court of Appeals for the Ninth Cir-
cuit, to do and receive what may appertain to justice
to be done in the premises and that a transcript of
the records, proceedings [202] and evidence in
said action, duly authenticated, may be transmitted

to the United States Circuit Court of Appeals for the Ninth Circuit.

SECURITY TRUST & SAVINGS BANK,
Complainant.

W. T. CRAIG,
Solicitor for Complainant.

The foregoing appeal is hereby allowed;

Dated July 26th 1915.

OSCAR A. TRIPPET,
United States District Judge.

[Endorsed]: Original. No. 235. In the United States District Court, Southern District of California, Southern Division. Security Tr. & Sav. Bank, a Corporation, Trustee, Complainant vs. Wm. A. Staats Company, et al. Defendant. Petition for Allowance of Appeal and Order Allowing the Same. Receipt of copy of the within is hereby admitted this ——day of July 26th, 1915. O'Melveny, Stevens & Millikin, Walker K. Tuller, Attorneys for Defts. William T. Craig, Equitable Savings Bank Building, Los Angeles, Cal., Attorney for Complainant. Filed Jul. 26, 1915, Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [203]

*In the District Court of the United States, Southern
District of California, Southern Division.*

SECURITY TRUST & SAVINGS BANK, a Corporation, Trustee in Bankruptcy of FIELDING J. STILSON COMPANY, a Corporation, Bankrupt,

Complainant,

vs.

WM. R. STAATS COMPANY, a Corporation, and
TITLE INSURANCE & TRUST COMPANY, a Corporation,

Defendants.

Comes now Security Trust & Savings Bank, a corporation, trustee in bankruptcy of Fielding J. Stilson, Company, a corporation, bankrupt, and files the following assignment of errors:

First. The United States District Court for the Southern District of California, Southern Division, erred in sustaining defendants' second exception to the report of the Special Master herein.

Second. Said Court erred in sustaining defendants' third exception to the report of the Special Master herein.

Third. Said Court erred in sustaining defendants' fifth exception to the report of the Special Master herein.

Fourth. Said Court erred in sustaining defendants' sixth exception to the report of the Special Master herein.

Fifth. Said Court erred in sustaining defend-

ants' seventh exception to the report of the Special Master herein.

Sixth. Said Court erred in sustaining defendants' eighth exception to the report of the Special Master herein.

Seventh. Said Court erred in ordering and adjudging that [204] the complainants' bill of complaint be dismissed.

Eighth. Said Court erred in not overruling each and every exception to said report of the Special Master herein.

Ninth. Said Court erred in that it did not order any decree that the deed of trust mentioned in complainant's bill was voidable by said complainant as such trustee and should be set aside, cancelled and annulled.

W. T. CRAIG,
Solicitor for Complainant.

[Endorsed]: Original. No. 235. In United States District Court, Southern District of California, Southern Division. Security Tr. & Sav. Bank, a Corporation, Trustee, Complainant, vs. Wm. A. Staats Company et al., Defendants. Assignment of Errors. Receipt of copy of the within is hereby admitted this — day of July 26, 1915. O'Melveny, Stevens & Millikin, Walter K. Tuller, Attorneys for Defts. William T. Craig, Equitable Savings Bank Building, Los Angeles, Cal., Attorney for Complainant. Filed Jul. 26, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [205]

*In the District Court of the United States, Southern
District of California, Southern Division.*

No. 235—CIVIL.

SECURITY TRUST & SAVINGS BANK, a Corporation,
Trustee in Bankruptcy of FIELD-
ING J. S. STILSON COMPANY, a Corporation,
Bankrupt,

Complainant,

vs.

WM. R. STAATS COMPANY, a Corporation, and
TITLE INSURANCE & TRUST COMPANY,
a Corporation,

Defendants.

Praeceptum for Transcript of Record.

To the Clerk of said Court

Sir: Please issue a certified copy of the records in the above-entitled proceeding, consisting of the papers following:

1. Minute Order of July 16, 1915, made by said Court in said Action.

2. Enrolled papers consisting of Bill of Complaint, Subpoena, Answer to Bill of Complaint, Special Master's Report, Exceptions to Report of Special Master, and Decree.

3. Notice of Motion to refer to Special Master with Affidavit and Minute Order made March 5th, 1914, referring the issues in said Action to the Special Master.

4. Notice of Appeal.

5. Assignment of Errors.

6. Citation on Appeal.

7. Petition for Allowance of Appeal and Order allowing same.

8. Testimony taken before Lynn Helm, Special Master, including Defendants' Exhibit "A," being the check drawn to the order of Wm. R. Staats Company by Fielding J. Stilson Company, [206] dated March 15, 1912.

9. Schedules in Bankruptcy in the matter of Fielding J. Stilson Company, a corporation, bankrupt.

W. T. CRAIG,

Attorney for Complainant.

To the foregoing there shall be added the following stipulation:

IT IS STIPULATED between the parties that it is the fact that on the hearing of the motion to refer this cause to the Special Master, the defendants appeared and duly objected to the granting of said order; that said order was granted and made over the objections of defendants.

W. T. CRAIG,

Attorney for Complainant.

O'MELVENY STEVENS & MILLIKIN,

WALTER K. TULLER,

Attorneys for Defendants.

Receipt of a copy of the foregoing Praecept is hereby admitted this 5th day of October, 1915, and it is stipulated and agreed that the papers mentioned and described therein are all the papers necessary to a determination by the Circuit Court of Appeals of

the appeal prosecuted by said complainant.

O'MELVENY STEVENS & MILLIKIN,
WALTER K. TULLER,

Attorneys for Defendants.

[Endorsed]: No. 235-Civil. In United States District Court Southern District of California Southern Division. Security Trust & Savings Bank, a corporation, trustee, complainant, vs. Wm. R. Staats Co. et. al., Defendants. Praeceptum for Transcript of Record. Filed Oct. 11, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. William T. Craig, 701 Higgins Bldg., Los Angeles, Cal., Attorney for Complainant. [207]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 235-CIVIL.

SECURITY TRUST & SAVINGS BANK, Trustee
in Bankruptcy of the Estate of FIELDING J.
STILSON, Bankrupt,

Complainant,

vs.

WM. R. STAATS COMPANY, a Corporation, and
TITLE INSURANCE & TRUST COM-
PANY, a Corporation,

Defendants.

I, Wm. M. Van Dyke, Clerk of the District Court
of the United States of America, in and for the

Southern District of California, do hereby certify the foregoing two hundred and seven (207) type-written pages, numbered from 1 to 207, inclusive, to be a full, true and correct copy of the Bill of Complaint, Subpoena and respondendum, Answer to Bill of Complaint, Notice of Motion to Refer to Special Master, Minute Order Referring to Special Master, Special Master's Report, Exceptions to Report of Special Master, Minute Order of July 16, 1915, in re Exceptions, Decree, Transcript of Testimony, Notice of Appeal, Petition for Allowance of Appeal and Order Allowing, Assignment of Errors and Praeipere for Transcript of Record on Appeal in the above and therein entitled cause, also of the Schedules A and B, in the matter of Fielding J. Stilson, Bankrupt, No. 1045 Bkcy., S. D., and that the same together constitute the record on appeal in said cause, as specified in the aforesaid Praeipere for Transcript of [208] Record, filed in my office on behalf of the appellant herein, by its solicitor of record;

I do further certify that the cost of the foregoing record is \$111.00, the amount whereof has been paid me by the Security Trust & Savings Bank, Trustee in Bankruptcy of the Estate of Fielding J. Stilson, Bankrupt, the appellant in said cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 23d day of November, in the year of our Lord one thousand nine hundred and fifteen, and of our

Independence the one hundred and fortieth.

WM. M. VAN DYKE,
Clerk of the District Court of the United States of
America, in and for the Southern District of
California.

By Leslie S. Colyer,
Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled
11/23/15. L. S. C.] [209]

[Endorsed]: No. 2691. United States Circuit
Court of Appeals for the Ninth Circuit Security
Trust & Savings Bank, a Corporation, as Trustee in
Bankruptcy of Fielding J. Stilson Company, a corpo-
ration, Bankrupt, Appellant, vs. Wm. R. Staats
Company, a corporation and Title Insurance & Trust
Company, a Corporation, Appellees. Transcript of
Record. Upon Appeal from the United States Dis-
trict Court for the Southern District of California,
Southern Division.

Filed November 30, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit,

By Meredith Sawyer,
Deputy Clerk.

[Order Enlarging Appellant's Time to November 1, 1915, to Docket Cause and File Record in U. S. Circuit Court of Appeals.]

In the United States Circuit Court of Appeals, Ninth Judicial Circuit.

SECURITY TRUST & SAVINGS BANK, a Corporation, Trustee in Bankruptcy of FIELDING J. STILSON COMPANY, a Corporation, Bankrupt,

Appellant,

vs.

WM. R. STAATS COMPANY, a Corporation, and
TITLE INSURANCE & TRUST COMPANY, a Corporation,

Appellees.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said appellant to docket said cause and file the record thereof with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby enlarged and extended to and including the 1st day of November, 1915.

Los Angeles, California, August 6th, 1915.

OSCAR A. TRIPPET,

United States District Judge, Southern District of California.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Security Trust & Savings Bank, a Corporation, Trustee, etc.,

vs. Wm. R. Staats Company, a Corporation, et al.
Order Extending Time to File Record. Filed Sep.
7, 1915. F. D. Monckton, Clerk.

**[Order Enlarging Appellant's Time to December 31,
1915, to Docket Cause and File Record in U. S.
Circuit Court of Appeals.]**

*In the United States Circuit Court of Appeals, Ninth
Judicial Circuit.*

SECURITY TRUST & SAVINGS BANK, a Cor-
poration, Trustee in Bankruptcy of FIELD-
ING J. STILSON COMPANY, a Corpora-
tion, Bankrupt.

Appellant,

vs.

WM. R. STAATS COMPANY, a Corporation, and
TITLE INSURANCE & TRUST COM-
PANY, a Corporation,

Appellees.

Good cause appearing therefor, it is hereby OR-
DERED, that the time heretofore allowed said ap-
pellant to docket said cause and file the record
thereof with the clerk of the United States Circuit
Court of Appeals for the Ninth Circuit, be, and the
same is hereby enlarged and extended to and includ-
ing the 31st day of December, 1915.

Dated at Los Angeles, October 30th 1915.

OSCAR A. TRIPPET,

U. S. District Judge, Southern District of Califor-
nia.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Security Trust & Savings Bank, Trustee, etc., Appellant, vs. Wm. R. Staats Company, et al., Appellees. Order Extending Time to File Record. Filed Nov. 1, 1915, F. D. Monckton, Clerk.

No. 2691. United States Circuit Court of Appeals for the Ninth Circuit. Two Orders Under Rule 16 Enlarging Time to Dec. 31, 1915, to File Record Thereof and to Declare Case. Refiled Nov. 30, 1915. F. D. Monckton, Clerk.

No. 2691.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

Security Trust & Savings Bank, a
corporation, as Trustee in Bank-
ruptcy of Fielding J. Stilson
Company, a corporation, bank-
rupt,

Appellant,

vs.

Wm. R. Staats Company, a cor-
poration, and Title Insurance &
Trust Company, a corporation,

Appellees.

Filed

JAN 27 1916

F. D. Monckton,
Clerk

BRIEF FOR APPELLANT.

W. T. CRAIG,

Attorney for Appellant.

No. 2691.

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Security Trust & Savings Bank, a
corporation, as Trustee in Bank-
ruptcy of Fielding J. Stilson
Company, a corporation, bank-
rupt,

Appellant.

vs.

Wm. R. Staats Company, a cor-
poration, and Title Insurance &
Trust Company, a corporation,

Appellees.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This case comes before this court upon an appeal from a judgment of dismissal entered in the United States District Court for the Southern Division of the Southern District of California (Oscar A. Trippet, judge).

The Fielding J. Stilson Company, a corporation, organized under the laws of the state of California, was adjudged a bankrupt on the 24th day of October, 1912, upon an involuntary petition filed on July 2nd, 1912. On the 19th day of March, 1912, the bankrupt Fielding J. Stilson Company conveyed to the Title Insurance & Trust Company lot seventeen (17) in block nine (9) and other lots in Angeleno Heights in the city of Los Angeles as security for an indebtedness amounting to \$3870.00 due from said bankrupt to Wm. R. Staats Company, a corporation. By the finding of the Special Master, which finding was affirmed by the District Court, the bankrupt was at the time of the giving of said trust deed insolvent. A bill of complaint in equity was filed in said District Court on the 22nd day of January, 1913, wherein it was alleged, among other things, that the transfer to the Title Insurance & Trust Company for the benefit of Wm. R. Staats Company was an unlawful preference and the complainant prayed that the deed, transfer and conveyance be vacated, set aside and declared void and that neither of the said defendants has any right, title, interest, estate, claim or lien in or to the real property conveyed to the Title Insurance & Trust Company. [See bill of complaint, page 4 of transcript.]

Thereafter the defendants filed their answer to the bill of complaint. [Transcript, page 22.] A motion was made to refer the issues to a Special Master and a notice of this motion was duly given to the defendants. [Transcript, page 29.] Objections were made by the defendants to the reference to the Special Master, which were overruled and the issues were referred

to Lynn Helm, Esq., as Special Master to hear the issues raised and report the same to the court with his findings of fact and conclusions of law thereon. [Transcript, page 32.]

Lynn Helm, the Special Master appointed to hear the issues, heard the evidence [transcript, pages 109 to 221], and thereafter reported his findings of fact and conclusions of law thereon to the District Court. [Transcript, pages 33 to 54.] The Special Master found that on the 19th day of March, 1912, at the time of the giving of the alleged preference, the Fielding J. Stilson Company was insolvent; that the giving of this security for an antecedent indebtedness enabled the Wm. R. Staats Company to obtain a greater percentage of its claim against the bankrupt than other creditors of the same class, and that the bankrupt was guilty of giving a preference by the giving of such security; that the Wm. R. Staats Company had reasonable cause to believe that it was intended by the giving of said security to give a preference and that the said trust deed so given was voidable at the instance of the trustee in bankruptcy. As conclusions of law he found that the transfer should be set aside, cancelled and annulled.

Thereafter the defendants filed their exceptions to the report of the Special Master. [Transcript, pages 55 to 60.] Upon the hearing of these exceptions the court overruled the defendants' first and fourth exceptions to the findings of the Special Master. The first exception overruled was that the case had been improperly referred to a Special Master, and the fourth exception overruled was that the Fielding J. Stilson

Company was at the time of the giving of the alleged preference insolvent. It will not be necessary for the appellant to argue either of these points as they stand approved, both by the Special Master and the District Judge. The District Judge, however, sustained the second exception to the finding that the enforcement of the trust deed had the effect of enabling the Wm. R. Staats Company to obtain a greater percentage of its debt than other creditors of its class and it was voidable at the option of the trustee. He also sustained the third exception to the finding that the trust deed was executed to secure an antecedent indebtedness. He also sustained the fifth exception to the finding that there was positive evidence that the sixty shares of stock referred to in the Special Master's findings had been hypothecated by the bankrupt corporation prior to the execution of the deed of trust. He also sustained the sixth exception to the finding that the effect of the deed of trust was to enable the defendant Wm. R. Staats Company to get a greater percentage of its claim than other creditors of the same class. This exception, however, was the same as the second exception to the report. He also sustained the seventh exception to the finding of the Special Master that the Wm. R. Staats Company, at the time of the execution of the deed of trust, had reasonable cause to believe that a preference was thereby intended. The ninth exception, which was an exception to the admission or exclusion of testimony, was not ruled upon by the District Judge.

The questions to be determined in this case, therefore, are whether under the evidence the trust deed

given to Wm. R. Staats Company was for an antecedent indebtedness and not for a present valuable consideration; and whether the Wm. R. Staats Company had reasonable cause to believe at the time it received the trust deed that it was receiving a preference.

**Errors Relied Upon by Appellant Upon This Appeal
Are As Follows:**

First: In sustaining the exception of the defendants to the finding of the Special Master that the deed of trust therein referred to constituted a preference and that the effect of the enforcement of such transfer was and is to enable the defendant Wm. R. Staats Company to obtain a greater percentage of its debt than other creditors of the said bankrupt of the same class and was and is voidable at the option of the trustee in bankruptcy.

Second: In sustaining the exception of the defendants to the finding of the Special Master that the deed of trust was executed to secure an antecedent indebtedness and that the transaction between the Fielding J. Stilson Company, a bankrupt, and Wm. R. Staats Company was not a single transaction.

Third: In sustaining the exception of the defendants to the finding of the Special Master that sixty shares of stock mentioned in the report had been hypothecated by the bankrupt corporation prior to the execution of the trust deed.

Fourth: In sustaining the exception of the defendants to the finding of the Special Master that the Wm. R. Staats Company at the time of the execution of

the deed of trust had reasonable cause to believe that a preference was thereby intended.

Fifth: In sustaining the exception of the defendants to the finding of the Special Master that the transfer was voidable by the trustee and should be set aside, cancelled and annulled and ordering a dismissal of the bill.

Did the Transfer from Fielding J. Stilson Company to The Title Insurance & Trust Company for the Benefit of Wm. R. Staats Company Constitute a Preference.

The finding of the Special Master that at the time this transfer was made the Fielding J. Stilson Company was insolvent and the admission of the defendants in their answer as follows:

“Defendants admit that on the 19th day of March, 1912, defendant Wm. R. Staats Company was a creditor of said Fielding J. Stilson Company in and for the sum of \$3870.00,”

together established a preference, that is, that the payment to Wm. R. Staats Company enabled it to receive a greater percentage than the other creditors, unless the securing of the Wm. R. Staats Company was in exchange for a present valuable consideration. This was the contention made before the Special Master and before the District Judge by the defendants in this action. The contention was overruled by the Special Master and was sustained by the District Judge. It will, therefore, be necessary to consider this question first.

The findings of fact on this question made by the Special Master cannot be controverted. "The bankrupt and the defendant Wm. R. Staats Company were brokers dealing in stocks, bonds and other securities and each of them was represented upon the Los Angeles Stock Exchange. [Transcript, pages 148 and 149.] On the 15th day of March, 1912, the bankrupt in due course of business purchased of the defendant Wm. R. Staats Company two hundred shares of stock of the Amalgamated Oil Company at \$64.50 per share. The defendant Wm. R. Staats Company delivered certificates representing sixty shares and gave a due bill for one hundred and forty shares for subsequent delivery. The sale was a cash transaction and the bankrupt gave its check to Wm. R. Staats Company on that date payable at the Citizens National Bank of Los Angeles for \$12,900.00, the cash value of the stock purchased. This check upon presentation to the Citizens National Bank was dishonored and rejected for want of funds. Immediately upon the rejection of the check on the 16th day of March, 1912, John E. Jardine, an officer of the Wm. R. Staats Company, telephoned Fielding J. Stilson, president of the bankrupt corporation, in reference to this check and its rejection and was advised by him that the check would be made good and for him to put it through the bank again the following banking day. It was put through on the following Monday, the 18th day of March, 1912, but was again rejected for want of funds. Again Stilson asked Jardine to put the check through the bank a third time and it was again rejected for want of funds. Mr. Stilson then told Mr. Jardine

that he was making disposition of some property and expected a payment of \$10,000.00 and that he would protect Wm. R. Staats Company. On the following day, the 19th, Mr. Stilson advised Mr. Jardine that he could not meet the payment, that the deal from which he expected funds was not consummated, but that the Fielding J. Stilson Company had some real estate and would give them security thereon. Thereupon one of the defendant's employees went with Mr. Stilson to examine the property offered as security, which Mr. Stilson estimated was of the value of \$25,000, and it was accepted and a trust deed was given that afternoon to the Title Insurance & Trust Company for the benefit of Wm. R. Staats Company to secure it in the sum of \$3870.00, the value of the sixty shares of stock of the Amalgamated Oil Company sold and delivered to the bankrupt as aforesaid, and was placed of record upon the following morning, March 20th, 1912, at nine o'clock a. m. That morning the bankrupt suspended and has transacted no business since that day." Testimony of Fielding J. Stilson. [Transcript, pages 150 to 166.] Testimony of John E. Jardine. [Transcript, pages 188 to 193.]

On the foregoing facts we submit that the findings and decision of the Special Master are absolutely conclusive and that no other findings than the ones he made are possible under these circumstances. We quote these findings as follows:

"It is contended on behalf of the defendant William R. Staats Company that the transaction between it and the bankrupt was a cash transaction; that upon

the failure of the bankrupt to pay its check, which was given for the stock received, that the defendant William R. Staats Company had a right of rescission and that the waiver of this right of rescission was present consideration for the taking of the transfer from the defendant, and that the transfer was in fact only security for a then present loan.

These contentions of the defendant cannot be upheld for it cannot be said that this transfer was not a diminution of the bankrupt's estate, nor that the transaction should be regarded as instantaneous and one. The right of rescission on the part of the defendant William R. Staats Company, with the right to the return to it of the certificates for the 60 shares of stock which it had on the 15th of March, 1912, delivered to the bankrupt, is predicated upon either that the seller retains the stock sold, or the ability on the part of the bankrupt to return the 60 shares of stock, otherwise William R. Staats Company would only have a general claim against the Fielding J. Stilson Company for the value of the stock and it would in effect to that extent be a general creditor of the bankrupt.

Otherwise, also, the right of rescission would not be an asset in the hands of William R. Staats Company, but would result in a lawsuit which might inevitably be a liability.

There is no testimony in this case that at any time after the 15th of March, 1912, Fielding J. Stilson Company had undisposed of 60 shares of stock which it received from William R. Staats Company on that date, but on the contrary there is positive testimony that the due bill for 140 shares of stock and the other 60 shares immediately on its receipt had been hypothecated by the Fielding J. Stilson Company, so that if William R. Staats Company had attempted to rescind it would not have been in any position to have re-

acquired the stock which it sold and delivered to the bankrupt.

William R. Staats Company consented to give the Fielding J. Stilson Company time to obtain the money from other sources and retained no lien upon the stock which it had sold it. Its consent in this respect, even if not intended to have that effect, broke the continuity of the transaction and made the stock or its proceeds part of the general assets of the bankrupt's estate."

Before proceeding further it will be necessary to dispose of one of the exceptions to the findings of the Special Master, which exception was sustained by the District Court. This was the fifth exception to the finding that the sixty shares of stock had been hypothecated by the bankrupt corporation prior to the execution of the trust deed.

The testimony is uncontradicted that the Fielding J. Stilson Company did no business whatever between the 19th day of March, 1912, and the date of the filing of the petition in bankruptcy. [Transcript, pages 120, 121, 218, 219.] The schedule in bankruptcy produced in evidence contained the following statement:

"Fielding J. Stilson Company purchased 200 Amalgamated Oil at 64½ from Wm. R. Staats Co. The check in payment was dishonored. The Staats Co. delivered 60 shares and gave bankrupt a due bill for balance of 140 shares, valued at \$8400.00. The bankrupt then borrowed money from A. L. Jameson, giving as security the 60 shares of Amalgamated Oil and the due bill of the Staats Co. for 140 shares. The 60 shares were sold." [Transcript, pages 102 and 103.]

The testimony of Fielding J. Stilson upon this subject, and referring to this entry in the schedules, was as follows:

“Q. You scheduled 140 Amalgamated Oil, \$8400.00, was that the stock which was purchased from the Staats Company which is the subject of this litigation? A. It is.

Q. You scheduled the stock as belonging to you at that time? A. The corporation, yes.

Q. It had been hypothecated, had it? A. According to the statement, 60 shares and a due bill, making 200 had been hypothecated.

Q. So that this asset would be offset by a corporation liability? A. It would.” [Transcript, page 136.]

The testimony of Mr. Stilson already referred to [pages 150 to 167] shows that the trust deed was executed at 4:30 p. m., March 19th, 1912, and was recorded at nine o'clock a. m. on March 20th, 1912. On the 20th day of March, 1912, the public prints of Los Angeles were all of them full of the difficulties of the Fielding J. Stilson Company and Mr. Jardine admitted knowing this fact. [Transcript, page 206.]

It, therefore, must be held that the finding of the Special Master that this stock had been hypothecated on or before March 19th, 1912, stands uncontradicted and no other finding was possible. No attempt was made by the defendants to prove or to show by anybody that at the time the trust deed was executed the Fielding J. Stilson Company had possession or control of the stock which Mr. Stilson testified was hypothecated.

There is no testimony in the record anywhere that

the Wm. R. Staats Company ever demanded from the Fielding J. Stilson Company the shares of stock which it had sold to it. There is absolutely no testimony in this record that any offer of rescission was ever made by the Wm. R. Staats Company or that it ever contemplated rescinding this transaction. Throughout the entire deal the Wm. R. Staats Company confirmed the sale to Fielding J. Stilson Company. In other words, it accepted a check in payment and when this check was dishonored instead of requiring the return of its stock it voluntarily gave the Fielding J. Stilson Company credit and put the check through again and again and again and then took security for its debt at a time when the Fielding J. Stilson Company had quit business, the evening before it was suspended on the Stock Exchange, and at a time when the Wm. R. Staats Company knew there were other dishonored checks of Fielding J. Stilson Company outstanding. [Transcript. pages 148, 166 and 167.]

Mr. Stilson testified that on the 12th or 13th day of March, 1912, the corporation found itself in financial difficulties by reason of the fact that about \$20,000 of their outstanding checks had been presented at the bank and refused payment for insufficient funds. [Transcript, pages 147, 148.] The transaction with the Wm. R. Staats Company occurred on March 15th, 1912 [transcript, page 221], and when its check was returned unpaid Mr. Jardine and Mr. Coggeshall went to the office of the Fielding J. Stilson Company. The following conversation occurred there:

“Q. (By Mr. Tuller): State what you said. A. Mr. Coggeshall asked if I had other items and I said I did; that is, I had other checks that had been turned down. I assured them at that time that I would do everything to protect them.

Q. Did you at that time tell them how many checks had gone bad? A. I believe I did.

Q. Do you remember anything further that was said at either of these conversations? A. My recollection is that they said they would wait until tomorrow, give me another day, extend the time for making good the check.

Q. Was anything said at either of those conversations by you as to how you would make good? A. Yes.

Q. Well, state what was said. A. I had made a tentative transaction for the sale of some real estate. * * * I told them I had made a tentative proposition which would bring me \$10,000.00 cash and that I would, upon receiving this money, which I expected the next day, take care of their item first.

Q. Do you remember when you next saw anybody connected with the Wm. R. Staats Company? A. I believe it was the following Tuesday, the 19th of March, 1912.

Q. Did you not see anyone connected with the Staats Company between those dates? A. It was possible I did.

Q. Did you mean the following day when you said Tuesday? A. I meant the following day. As I remember, I called at Mr. Jardine's office.

Q. State what was said then. A. I—as I remember, I said to Mr. Jardine that I had not yet received the \$10,000 and that I felt uncertain as to the immediate future for the reason that I had been advised that my transaction had failed of consummation. That

information was conveyed to me Monday evening late, and on Tuesday I called at Mr. Jardine's office.

Q. What did he say? A. Something as to how I could meet it or what I was going to do about it, and I said I would do everything within my power to protect them and proposed to give them collateral in the nature of equities upon certain real estate of the corporation. Mr. Staats said to me that he thought that would be all right if the equity was as represented. Mr. Coggeshall was there, either called into the conversation or was there, I am not certain, but the arrangement was made between Mr. Coggeshall and myself to inspect this property and an appointment agreed upon to go that afternoon."

In pursuance of the foregoing arrangement, the parties went to the property and the alleged preference was consummated. This testimony is not contradicted. It certainly shows that after the check had been dishonored, further credit was given on three different occasions, and finally after being informed that it was impossible to pay the cash, the security was taken for the debt.

"Where bankrupts, who were stock brokers, obtain from defendant banks at the beginning of the banking hours, day or clearance loans and later in the same day when bankrupts were insolvent and the banks had reasonable cause to believe them to be so, delivered to the banks upon demand a large amount of collaterals as security, the transactions constituted preferences and the securities were recoverable by bankrupt's trustee."

Hotchkiss v. National City Bank, 201 Fed. 664.

The foregoing case was affirmed by the Supreme Court of the United States and this case, cited below, is referred to in the report of the Special Master [transcript, pages 46 and 47] as being similar to the one at bar.

National City Bank v. Hotchkiss, 231 U. S.
page 50:

“It is the date of the actual transfer that governs; and the fact that the transfer was in fulfillment of an agreement which itself was based on a valuable consideration passing between the parties previously will not cause the transfer to relate back to the time of the passing of the original consideration to make it a transfer on a presently passing consideration. It is a transfer on a pre-existing obligation; and may, if the other elements co-exist, constitute a preference.”

Remington on Bankruptcy, 2nd Edition, Sec.
1326¼.

The length of time during which credit is given is immaterial. In the National City Bank cases the credit was given from ten o'clock in the morning to three o'clock in the afternoon when the payment was made which constituted a preference. This is particularly so in stock brokers' transactions. While it might seem hard that the stock of Wm. R. Staats Company should be taken in the manner in which it was engulfed in this failure, due consideration must be given to the other creditors whose property was engulfed, whose checks were repudiated and whose money was lost in the various transactions as shown by the schedules of this bankrupt. The finding of the Special Master

shows the liabilities of this bankrupt to be in excess of \$250,000. However innocent the intention of the Wm. R. Staats Company in its original conception, the moment that it found that its confidence had been misplaced and it consented to convert the wrong into a debt for which it took security, it then committed a wrong so far as the other creditors of this bankrupt were concerned and took unto itself a part of the property which rightfully should belong to all of the creditors. Doubtless, it was pursuing the maxim, *lex vigilantibus non dormientibus subvenit*. This maxim, however, has no application to those who deal with insolvents.

We again submit that the statement of the Special Master in his report [Transcript, pages 49 and 50] is an absolutely correct statement of the facts in this case:

“The continuity of the transaction was broken when the defendant Wm. R. Staats Company agreed to wait for its money, and put the check through the second time and third time, and when it afterwards agreed to wait for the bankrupt to obtain funds from another deal or from other property, and when in fact it allowed the stock which it sold to the bankrupt to so far pass out of its hands that it could not reach forth and obtain it upon any rescission of the transaction. Thereafter it became a general creditor of the bankrupt. No doubt by its selling the stock to the Fielding J. Stilson Company it increased its estate, but so have many general creditors by their advances or transactions with the bankrupt. While the defendant may have taken the mortgage in lieu of cash, it was the security for an antecedent indebtedness absolutely due and owing from the Fielding J. Stilson Company to the defendant prior to the giving of the security. * * * A loan pre-

supposes a new and present advancement to the borrower. It means the advancement of ready funds or property whereby the estate of the bankrupt would be increased at that time to the amount of the loan or to the amount of the actual cash advanced at that time. A loan is not the security or payment of an antecedent indebtedness as was the condition here presented. * * * The giving of this security by the defendant when it was insolvent, as security for an antecedent indebtedness, due by it, had necessarily the effect of giving the defendant, the Wm. R. Staats Company, a greater percentage of its claim against the bankrupt than other creditors of the same class, and it must therefore be held that the bankrupt gave a preference by the giving of said security to said defendant.”

Did the Defendant Wm. R. Staats Company Have Reasonable Cause to Believe, when it Received the Security, that it was Intended Thereby to Give a Preference.

It being found by the Special Master and confirmed by the District Court that the Fielding J. Stilson Company was insolvent when the payment was made to the Wm. R. Staats Company, and it having been shown that the payment to the Wm. R. Staats Company was of an antecedent indebtedness and, therefore, that such payment necessarily enabled the Wm. R. Staats Company to obtain a greater percentage of its debt than other unsecured creditors, the only remaining question to be determined in this action, in order to enable the plaintiff to recover, is to establish the fact that the Wm. R. Staats Company at the time it received this payment did have reasonable cause to believe that it

was obtaining a preference. We have no doubt at all but what the District Judge would have sustained the Special Master on this question if he had not found in favor of the defendants upon the question of the security being given for an antecedent debt. In other words, when the District Judge came to the conclusion that the purchase of the stock by the Fielding J. Stilson Company and the giving of the checks and the security constituted all one transaction, or at least that there was a present consideration passing from the Wm. R. Staats Company to the Fielding J. Stilson Company for the security, then the District Judge was necessarily forced to find that the Wm. R. Staats Company did not have reasonable cause to believe that it was getting a preference.

We have detailed some of the testimony to the effect that the Wm. R. Staats Company when its check was returned for want of funds put its check through the bank twice more and each time it was returned and that the Wm. R. Staats Company was informed that there were \$20,000 of checks that had been rejected by the bank and that the Fielding J. Stilson Company had then assured the Wm. R. Staats Company that they would be protected by security. It is true that Mr. Jardine testified that he had no recollection of the conversation in relation to the \$20,000 checks. The Special Master, however, finds as follows [transcript, page 51]: “Mr. Jardine does not contradict this statement except by his statement that he has no recollection that Mr. Stilson so told him, and I must therefore find that the defendant Wm. R. Staats Company not only knew that the check given them had been rejected, but

that they had notice that other checks of the bankrupt were outstanding which had been rejected for the same reason of want of funds. These circumstances were sufficient to put a reasonably prudent man upon inquiry." In addition to this it was proven that Mr. Jardine was a member of the Stock Exchange of which Fielding J. Stilson was a member, and that Stilson was suspended on that board on March 20th, 1912. [Transcript, page 149.]

We have already called attention to the fact that the trust deed was executed on March 19th, 1912, at 4:30 o'clock p. m.

Any reading of the testimony relating to the manner in which this security was given must lead any man to the conclusion of the absolute haste with which this security was procured. In other words, the Wm. R. Staats Company was so thoroughly convinced of the financial difficulties of the Fielding J. Stilson Company that on the 19th day of March, 1912, when the check was finally turned down and they accepted the proposition for security, they sent their representative, Mr. Coggeshall, with Fielding J. Stilson in an automobile and they inspected between six and a dozen pieces of property, all of which Mr. Stilson had informed Mr. Jardine were subject to a first mortgage. Mr. Jardine suggested the giving of a trust deed upon the mortgaged property. They returned to the office of Wm. R. Staats Company at about half past four in the afternoon and at the suggestion of Mr. Coggeshall of the Wm. R. Staats Company they went to the Title Insurance & Trust Company at Los Angeles and reached there at twenty minutes to five o'clock. Some clerk in

the Title Insurance & Trust Company then prepared the deed of trust and the note. [Transcript, pages 156 to 160.] Another important fact is that the Wm. R. Staats Company did not take security for the full amount of the \$12,900 represented by the check, but they repudiated their due bill for 140 shares and took security only for the sixty shares. [Transcript, page 161.] Nothing whatever was said about an abstract or certificate of title to the property. Mr. Stilson was asked the question:

“Q. After it was prepared was anything said about an abstract or certificate of title by anybody? A. No, except my statement that I made to them that the property was covered by those mortgages. I didn’t offer any certificate. They didn’t ask for one.

Q. Was any abstract or certificate demanded of you to show the title to the property? A. No.” [Transcript, page 162.]

After the trust deed had been prepared it was necessary to get Fielding J. Stilson’s brother, Carroll Stilson, the secretary, to sign and place the seal upon it, which was done, and the instruments were delivered to the Wm. R. Staats Company. The instrument is attached to the bill of complaint as Exhibit “A” and is found on pages 8 to 19 of the transcript. The recording date was March 20th, 1912, at nine a. m. The note was payable one day after date. Mr. Jardine was not very frank in his answers with relation to his knowledge of the financial condition of the Fielding J. Stilson Company. For instance, on cross-examination the following question was asked him with relation to information that might have been given to him by Mr.

Brooks, a representative of Wm. R. Staats Company on the Stock Board:

“Q. Had Mr Brooks prior to the 19th day of March, 1912, informed you of any rumors upon the Stock Exchange with relation to the affairs of the Fielding J. Stilson Company? A. I cannot remember.”

We have already shown that the Fielding J. Stilson Company was suspended on March 20th, 1912, and that Mr. Jardine on that day knew that the public prints of Los Angeles were filled with the reports of the failure of this concern. It is not to be wondered at that the Special Master was of the opinion that a company consummating a transaction with the haste of this transaction and with the knowledge of the financial difficulties that had already overtaken the Fielding J. Stilson Company, was not pursuing an innocent course devoid of all notice and knowledge of what was impending. The fact alone that a stock broker's checks were outstanding to the amount of \$20,000 repudiated by the banks would be sufficient to put even the most unsophisticated person upon notice that the broker was indeed “broke” and that his financial failure was a matter of hours. Any other conclusion would seem utterly impossible.

As we have already said, we are of the opinion that the District Judge, if he had not been of the opinion that this security was part of one transaction, would have sustained the Special Master's findings as follows:

“I therefore find that said bankrupt having given a preference, that William R. Staats Company receiving the same and having benefited thereby, had reasonable

cause to believe that it was intended by the giving of said security to give a preference and that the said trust deed so given is voidable at the instance of the trustee in bankruptcy." [Transcript, page 53.]

"In an action by a trustee to recover an alleged preference, payments to a creditor made within the four months period, reasonable cause to believe that a preference was intended does not require proof that defendant had either actual knowledge or actual belief as to insolvency of the bankrupt at the time of the payment, but only of such surrounding circumstances as would lead an ordinarily prudent business man to conclude that a preference was intended."

Sundheim v. Ridge Avenue Bank, 138 Fed. 951;
R. H. Herron Co. v. Wm. H. Moore, Jr., 208
Fed. 134 (C. C. A. 9th Ct.);

In re Dorr, 196 Fed. 292 (C. C. A. 9th Ct.);

In re Thomas Deutschle & Co., 182 Fed. 435.

"Where a creditor, about to receive a payment or security from his debtor, has knowledge or notice of facts which would incite a man of ordinary prudence and business intelligence to inquire as to a debtor's solvency and the probable effect of the transaction as a preference, he is bound to prosecute a reasonably diligent inquiry to ascertain the truth; and if he fails to do so, he is chargeable with knowledge of the facts which such an inquiry would have disclosed. * * * In fact, 'reasonable cause to believe' in the Bankruptcy Act, covers substantially the same field as 'notice' in determining whether a person is a *bona fide* purchaser of property."

Black on Bankruptcy, Sec. 599.

“Notice of facts which would incite a person of reasonable prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would develop.”

Coder v. McPherson, 152 Fed. 951 (C. C. A. 8th Ct.);

Pittsburg Plate Glass Co. v. Edwards, 148 Fed. 377 (C. C. A. 8th Ct.);

Tilt v. Citizens Trust Co., 191 Fed. 401;

Collier on Bankruptcy, p. 820;

Remington on Bankruptcy, Secs. 1396, 1397, 1398, 1400, 1401 and 1402;

Ogden v. Reddish, 200 Fed. 977.

It is respectfully submitted that where there was any conflict in the testimony the findings of the Special Master must be taken as giving the true facts. In other words, the facts as found by the Special Master should be accepted by this court, and doubtless were by the learned District Judge. The only question to be determined by the District Court was whether from the facts found by the Special Master the plaintiff was entitled to recover.

“The findings of fact by the Special Master will not be reversed, except upon clear and convincing proof of error.”

Remington on Bankruptcy, Sec. 2634;

In re Harr, 143 Fed. 421;

Southern Pine Co. v. Savannah Trust Co., 141 Fed. 802 (C. C. A. 5th Ct.);

Camden v. Stuart, 144 U. S. 104.

As to the findings of fact of the Special Master, which were approved by the District Judge, it is submitted that they will not be inquired into by this court.

“The Master and the court below concurred in the findings of facts, and when that is the case, this court will not reverse or modify unless a very plain mistake is definitely pointed out.”

Buckingham v. Estes, 128 Fed. 584.

It is respectfully submitted that the order of the District Court sustaining the exceptions to the Special Master's report and dismissing the bill should be reversed and that the exceptions to the report should be overruled and judgment ordered on the report of the Special Master, in favor of the complainant.

W. T. CRAIG,

Solicitor for Complainant.

No. 2691.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

Security Trust & Savings Bank, a
corporation, as Trustee in Bank-
ruptcy of Fielding J. Stilson
Company, a corporation, bank-
rupt,

Appellant.

vs.

William R. Staats Company, a cor-
poration, and Title Insurance &
Trust Company, a corporation,

Appellees.

Filed

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F. D. MUNCHING,
CLERK.

BRIEF FOR APPELLEES.

O'MELVENY, STEVENS & MILLIKIN,
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Attorneys for Appellees.

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BRIEF FOR APPELLEES.

The salient facts in this case are reasonably clear. On the 15th of March, 1912, Fielding J. Stilson Company purchased from appellee, Staats Company, as a cash transaction, two hundred shares of the capital stock of Amalgamated Oil Company, a corporation, at the price of \$64.50 a share, which it is admitted was the then market value of said stock. It is also admitted by all parties, and was found by the Special Master, that the sale was a cash transaction. [See transcript, page 42.] The Staats Company delivered a certificate

for sixty shares of stock and due bill for one hundred forty shares, taking therefor the check of the Stilson Company drawn on the Citizens National Bank of Los Angeles for the sum of \$12,900.00, being the purchase price. This check is in evidence and appears at page 221 of the transcript. The check was deposited by the Staats Company in the regular course of business in its bank, the National Bank of California. [Transcript, page 189.] On the following day, March 16th, which was Saturday, the National Bank of California notified the Staats Company that the check had been dishonored for insufficient funds. Upon Mr. Stilson's request and assurance that the check would be made good, the check was put through the bank again on Saturday, the 16th, and also on Monday, the 18th, but both times was dishonored for insufficient funds. Thereupon, and on March 19th, the Stilson Company executed its note for the sum of \$3,870.00, being the price of sixty shares of stock, and gave a deed of trust upon certain property (which was subject to prior liens) to secure the payment of the note. The Stilson Company was subsequently declared a bankrupt and the trustee brought this action to set aside said deed of trust on the ground that it constituted an unlawful preference.

It will be noted that it is not questioned by anyone that the original transaction between the Stilson Company and the Staats Company was a *bona fide* purchase and sale, *for cash*, of stock in a corporation at the then market value of said stock, and that the Staats Company actually delivered to the Stilson Company a certificate for sixty shares of stock and a due bill for one hundred forty shares; that the check of the Stilson

Company for \$12,900.00 was given therefor as cash and accepted by the Staats Company in good faith, and that the Stilson Company did not at that time have sufficient funds to meet the check. It cannot be questioned that this transaction constituted a fraud upon the Staats Company. Later in the brief numerous authorities will be cited showing that this constituted a fraud, and that both for this reason and also because the purchase price was not paid, title to the stock remained in the Staats Company. The Staats Company never agreed (until it accepted the note and deed of trust) to become a creditor of the Stilson Company. All it did was to make a *bona fide* cash sale to it. Yet the trustee, by this action, seeks to keep the stock so obtained by Stilson's fraud and to force the Staats Company into the position of a general unsecured creditor. But for Stilson's fraud, the property would have never come into the bankrupt's hands. For the court to do what complainant in this action asks it to do would be for it, by its decree, to carry out and effectuate Stilson's fraud. Counsel states that the court is bound by the Bankruptcy Act. But the Bankruptcy Act was never intended to require or permit courts to perpetuate or enforce fraud. Neither that act or any law requires or permits, we submit, that it should be done in this case. This is true for several reasons:

First: The transaction being a cash sale, title did not pass until the purchase price was actually paid, and therefore the sale, in contemplation of law, did not occur until the note and deed of trust were accepted.

Second: Possession of the stock having been obtained by Stilson's fraud, no title passed. For both

these reasons, therefore, the sale was not really made and title did not pass until the note and deed of trust were given and accepted.

Third: Even if it could be held that title passed when the worthless check was given, still the Staats Company had a right to rescind the transaction for Stilson's fraud. When it accepted the note and deed of trust, it surrendered this right to rescind and therefore gave for the note and securities a "present fair consideration," and hence the note and deed are not open to attack.

Fourth: Under well settled principles the entire dealings between the Stilson Company and the Staats Company constituted but one single transaction, the net result of which was not to diminish the estate of the Stilson Company, and it therefore cannot be set aside.

Fifth: Even if none of the foregoing points were sound, it is not shown that the transaction constituted a preference. To constitute a preference it must be shown that a transfer of property has been made within four months before the filing of the petition, and that the effect of the enforcement of such transfer will be to enable the creditor to obtain a greater percentage of his debt than any other creditor of the same class. (Bankruptcy Act, section 60.) In the case at bar the showing was insufficient for four reasons:

(a) The deed of trust was given, not to secure the entire claim of \$12,900.00, but only \$3,870.00.

(b) The present value of the property was not shown, and therefore it is impossible to find that the enforcement of the security would enable the Staats

Company to “secure a greater percentage of its debt than any other creditor of the same class.”

(c) The evidence showed that the deed of trust was given only on an equity in the property, and the amount of the prior liens was not shown; hence for this reason also it was not shown that the enforcement of the security would enable the Staats Company to secure a greater percentage of its debt than “any other creditors of the same class”—assuming that the Staats Company can be treated as a creditor at all.

(d) There is no showing, unless indeed there be a fair inference that all creditors will be paid in full, as to how much “other creditors of the same class” will receive.

Sixth: The finding of the learned trial court that the Staats Company at the time it accepted the note and deed of trust did not have reasonable cause to believe that the Stilson Company was insolvent, within the meaning of the Bankruptcy Act, is in accordance with the evidence.

We proceed to a discussion of these several propositions:

FIRST: THE TRANSACTION BEING A CASH SALE, NO TITLE PASSED UNTIL THE PURCHASE PRICE WAS ACTUALLY PAID; HENCE, THE SALE WAS REALLY MADE AND TITLE PASSED ONLY WHEN THE NOTE AND DEED OF TRUST WERE ACCEPTED.

The principle that in a cash sale title does not pass until the purchase price is actually paid is thoroughly established.

In *Hodgson v. Barrett*, 33 Ohio State 63, the facts were that the plaintiffs sold a barge load of coal, the terms of sale being half cash. A check was given for that half. Possession of the coal was delivered. The check was dishonored. It was held that title had not passed. The court said:

“The terms of sale were, one-half cash, and the other half by promissory note at sixty days. The delivery of the coal, and payment therefor, were concurrent conditions of the sale. Plaintiffs could not demand payment till delivery, and upon delivery they had a right to expect present payment. A delivery, under such circumstances, without more, is, in law, conditional; and if payment be not made, the vendor may resume possession of the thing sold. *Wabash Elevator Co. v. First Nat. Bk. of Toledo*, 23 Ohio St. 311, and authorities there cited; *Benj. on Sales*, §§ 592, 677.

“We must, therefore, regard the delivery mentioned in the agreed statement as conditional only, nothing being stated which would give it a different character. The purchasers proceeded to the execution of the contract, on their part, by making and delivering their promissory note for the deferred payment. For some unexplained reason, the cash payment was not made till the next day. But we can not infer, from the mere fact that a night intervened before the cash payment was made, that the plaintiffs consented to waive their right to require present payment, or to resume possession of the barge and its cargo, if payment should be refused. Such temporary delay is quite consistent with the idea that the parties intended their respective rights to remain in *statu quo*, until payment should be made. The burden is on the defendant to show that the plaintiffs waived any of their rights under the contract. On the next day the purchasers gave a check on their banker for the cash payment, and on the following day

became bankrupts. This was only a conditional payment, which would become absolute if the check was paid on presentation, or if presentation was unreasonably delayed to the injury of the drawers. The drawing of this check was a false representation that the drawers had funds sufficient to meet it, in the hands of the drawees; and its acceptance by plaintiffs' agents was not an election to take security instead of cash."

In *Mathews et al. v. Cowan et al.*, 59 Ill. 341, plaintiff sold a quantity of flour for cash and a check was given in payment. The check was dishonored. It was held that the title had not passed. The court said:

"In the case of a sale for cash, the payment of the price is a condition precedent, implied in the contract of sale. If the seller does deliver freely and absolutely, and without any fraudulent contrivance on the part of the buyer to obtain possession, and without exacting or expecting simultaneous payment, the precedent condition of payment is waived, and the right of property passes. But Mr. Chancellor Kent says this rule is understood not to apply to cases where payment is expected simultaneously with delivery, and is omitted, evaded or refused by the vendee, on getting the goods under his control; for the delivery, in such case, is merely conditional, and the non-payment would be an act of fraud, entering into the original agreement, which would render the whole contract void, and the seller would have a right, instantly, to reclaim the goods. 2 Kent Com. 666.

"A check is always supposed to be drawn upon a previous deposit of funds (*Story on Prom. Notes*, sec. 489); the giving of the check was not payment of the money; the taking of it was but as a means of obtaining the money. *King v. Strong*, 35 Ill. 9. And being utterly futile to that end, the purchase price was not

paid, and we are of opinion the precedent condition of its payment was not waived by the delivery under such circumstances, and that, as between buyer and seller, the property never passed from the plaintiffs to the defendants, and the appropriation of the flour by the defendants, to their own use, was a conversion of the plaintiffs' property. See *Tyler v. Freeman*, 3 Cush. 261; *Hill v. Freeman*, *Ibid.* 257."

In *National Bank of Commerce v. Chicago, B. & N. R. Co.*, 44 Minn. 224, 46 N. W. 342, there was involved the sale of certain wheat, the sale being a cash transaction. A check was given and upon presentation was dishonored. The holding was in accord with the cases already cited. We quote from the opinion as follows:

"Where goods are sold for cash, delivery and payment are concurrent conditions, and a delivery in expectation of immediate payment is conditional only; and if payment is not made as agreed, the vendor may reclaim the goods. Hence, the real question in these cases is whether there was an unconditional delivery of the wheat to Moak & Co.; or, otherwise expressed, did the elevator company waive the condition of cash payment on delivery, or accept the check as absolute payment? It had the undoubted right to waive this condition, also to waive payment in cash and accept the check as unconditional payment; but we fail to find anything in the facts to support any such conclusion. Nothing is better settled than that a check is not payment, but is only so when the cash is received on it. There is no presumption that a creditor takes a check in payment arising from the mere fact that he accepts it from his debtor. The presumption is just the contrary. Where payment is made by check drawn by a

debtor on his banker, this is merely a mode of making a cash payment, and not giving or accepting a security. Such payment is only conditional, or a means of obtaining the money. In one sense the holder of the check becomes the agent of the drawer to collect the money on it; and if it is dishonored there is no accord and satisfaction of the debt. 2 Pars. Cont. 623; Benj. Sales, § 731; *Brown v. Leckie*, 43 Ill. 497; *Woodburn v. Woodburn*, 115 Ill. 427, 5 N. E. Rep. 82; *Cromwell v. Lovett*, 1 Hall. 56. Where goods are sold for cash on delivery, and payment is made by the purchaser by check on his banker, such payment is only conditional, and the delivery of the goods also only conditional; and if the check on due presentation is dishonored, the vendor may retake the goods. *Hodgson v. Barrett*, 33 Ohio St. 63. Conceding, for the sake of argument, that there was in this case a constructive delivery of the wheat contemporaneously with the receipt of the check, there is an entire absence of evidence to rebut the presumption that it was only conditional upon the check being paid on presentation. Therefore, upon the dishonor of the check, the right of the elevator company to retake the wheat still continued in full force. * * * It seems to us perfectly clear that, at least up to the 17th, this wheat was in the actual possession and control of the elevator company, and that if there was any delivery of any kind to Moak & Co. on that day, on the receipt of their check, it was only conditional on the check being paid on presentation; and therefore when the check was dishonored the elevator company had an undoubted right to retake or retain the wheat, whichever it may be termed. It is urged that a different rule applies where intermediately the property has been purchased by an innocent subvendee for value. The general rule is that a title, like a stream, cannot rise higher than its source, and it is

difficult to see how a person can communicate a better title than he himself has unless some principle of equitable estoppel comes into operation against the person claiming under what would otherwise be the better title. We have found no case holding that any different rule obtains in cases like the present, as to a subvendee, than as to the original purchaser, except perhaps that as to the former a waiver of the condition, as for example, of payment on delivery, will be more readily inferred from the delivery, especially when the condition is not express, but implied. See *Benj. Sales* (Amer. note) 269; *Coggill v. Railway Co.*, 3 Gray 545; *Hirschorn v. Canney*, 98 Mass. 150; *Armour v. Pecker*, 123 Mass. 143. It is suggested that Gen. St. 1878, c. 39, § 15, would apply, and that any condition attached to the delivery would be void, as against creditors and purchasers, unless the contract is filed. This statute may establish such a rule as to conditional sales, properly so called where the condition is that the title is to pass, not upon delivery, but upon payment at some subsequent date. But it can have no application to a case like the present, where the terms of sale are cash on delivery, and the only condition attached to the delivery arises from the fact that payment by check is conditional. In such a case, if the check is dishonored, the vendor, if guilty of no fraud or laches which create an equitable estoppel against him, may retake the property even from an innocent subvendee for value."

In *Merchants Bank v. McGraw*, 59 Fed. 972, this court had before it a similar question. That case involved a cash transaction where the goods were delivered to a railroad company consigned to the purchaser. The purchase price, however, was not paid. This court unanimously held that title did not pass. The opinion delivered by Judge Gilbert contains an

extensive review of a number of authorities showing that this proposition is thoroughly established.

Harkness v. Russell, 118 U. S. 663, involved the question of the validity of contracts for sale, where possession passed to the vendee but title remained in the vendor until payment of the purchase price. The opinion of Mr. Justice Bradley contains a most scholarly discussion of the principles, and an elaborate review of authorities. The court unanimously holds that such contracts are perfectly valid; that title does remain in the vendor until the purchase price is paid, and that the vendee can transfer no greater title than he himself has. The opinion is too long to quote. We respectfully refer the court to a consideration of it.

In Rogers v. Bockman, 109 Cal. 552, the same question was presented to the Supreme Court of California, and the holding was the same. The court relies upon Harkness v. Russell, *supra*, and adopted in full the conclusions there announced.

The same principle is well stated in Benjamin on Sales, 6th edition, page 282. The discussion is too long to quote, but we respectfully refer the court to it, as well as to Davidson v. Davis, 125 U. S. 91, therein cited, which is to the same effect, although indeed this case is much stronger since it involved a case where a promissory note was given in payment.

In Sprague etc. Co. v. Fuller, 158 Fed. 588, the Circuit Court of Appeals for the Fifth Circuit had a similar question presented. That involved the sale of certain machinery for cash, actual possession having

been delivered to vendee which was thereafter adjudged a bankrupt. Payment had not been made. It was held that title remained in the vendor. In the course of the opinion, the court said:

“We concur with the learned district judge that ‘there is no doubt about the proposition that, where personalty is sold for cash on delivery, the payment stipulated for is a condition precedent, and, unless complied, the seller may reclaim the property.’ We think it is settled law that ‘“where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer.’ Benjamin on Sales (3d Ed.) § 320.”’ And it has been held by controlling authority that, where goods were sold to be paid for in cash or securities on delivery, ‘the sales were conditional only, and that the vendors were entitled to retake the goods, even after delivery, if the condition was not performed, the delivery being considered as conditional.’” See also *Lamb v. Utley* (Mich.), 110 N. W. 50.

The recent case of *Bailey v. Baker Ice Company*, decided by the Supreme Court November 29, 1915 (U. S. Advance Opinions 1915, page 50), establishes the proposition that in cases of a conditional sale, even though ~~title~~^{possession} has passed to the buyer, the payment of the purchase price cannot constitute a preference. This being true it, of course, follows necessarily that a note and security taken in lieu of the cash cannot constitute a preference.

It is clear, therefore, that title did not pass to the Stilson Company, but remained in the Staats Company

up to the time when the note and deed of trust were received. At that moment, and not before, title passed. Therefore, the situation is exactly the same as if the transaction of purchase and sale had all occurred at that moment. The Staats Company therefore sold to the Stilson Company certain shares of stock of the market value of \$3,870.00, and took a note and deed of trust therefor. It is thoroughly settled that such a transaction may be made at any time, and is in no sense a preference or subject to attack by anyone. Authorities to this point hardly seem necessary, but *Cook v. Tullis*, 18 Wall 332, and *McDonald v. Clearwater Co.*, 164 Fed. 1007, 1011, are directly in point. For this reason alone, therefore, the judgment of the court below was right.

SECOND: THE STOCK HAVING BEEN SECURED BY STILSON'S FRAUD IN GIVING A WORTHLESS CHECK, TITLE REMAINED IN THE STAATS COMPANY AND DID NOT PASS UNTIL THE NOTE AND DEED OF TRUST WERE ACCEPTED.

It is of course thoroughly settled law that the giving of a check is a representation that the drawer has sufficient funds to meet the check, and that if this is not true, it is a fraud on the seller of the goods for which the check is given. The cases of *Hodgson v. Barrett*, 33 Ohio St. 63, and *Mathews v. Cowan*, 59 Ill. 341, already reviewed, are directly in point on the proposition that the giving of a worthless check was a fraud upon the Staats Company. Many other cases might be cited to the same effect, but it seems unnecessary to take up the time of the court, since the proposition is fundamental. It is equally well settled that where

parties go through the form of a sale and the same is induced through the fraud of the vendee, no title passes. This is both general law and the established law of California. We will not take the time to review any large number of authorities in other states, but simply call the attention of the court to the cases of *Amer v. Hightower*, 70 Cal. 440, and *Wendling Lumber Company v. Glenwood Lumber Company*, 153 Cal. 411, 414. It is clear, therefore, for this reason also, that title did not pass, but remained in the Staats Company. Therefore, in contemplation of the law, the sale was made at the time the note and deed of trust were accepted. The situation is exactly the same as if Stilson had purchased the stock, giving his note and deed of trust therefor in the first instance. This being true, the transaction cannot of course be a preference or subject to attack.

THIRD: EVEN IF IT COULD BE HELD THAT TITLE HAD PASSED, STILL THE STAATS COMPANY HAD A RIGHT TO RESCIND THE TRANSACTION, WHICH RIGHT IT SURRENDERED UPON THE ACCEPTANCE BY IT OF THE NOTE AND DEED OF TRUST. THUS IT GAVE A "PRESENT FAIR CONSIDERATION" UNDER THE PROVISIONS OF SECTION 67e OF THE BANKRUPTCY ACT.

We feel that this point needs but little elaboration, since it has already been shown that no title passed until the note and deed of trust were accepted and, therefore, that in contemplation of the law the sale took place at that moment. But even if it could be held otherwise, still it must be conceded that the Staats Company had a right to rescind the transaction for

Stilson's fraud. No citation of authorities on this point seems necessary. This right it surrendered when it accepted the note and deed of trust. We believe there can be no doubt that it thus gave a present fair consideration for the note and deed of trust; and therefore, even if this were the only point in the case, the judgment of the court below should be affirmed.

Counsel do not expressly contend that the fact that the Staats Company, upon Stilson's assurance that it would be paid, put the check through the bank twice after its first dishonor, deprived it of this right, although they seem to make some intimations to this effect. If counsel intends to make this contention, it is obviously without merit. Indeed, for the court to sustain counsel's contention that the taking of the note and deed of trust constituted a preference, it would have to be held that if the check had been paid on its second or third presentation that very payment would constitute a preference. No one, we think, would have the hardihood to contend for any such proposition. Anyone has a right to sell his property and take its fair value in cash. "A fair exchange of values may be made at any time, even if one of the parties is insolvent." (*Cook v. Tullis*, 18 Wallace 332; *McDonald v. Clearwater etc. Co.*, 164 Fed. 1007, 1011.) Staats Company having made a cash sale at the fair value of the property, was entitled to receive its cash. It was just as much entitled to receive it on the second or third presentation of the check as on the first. The note and deed of trust were simply taken in lieu of the cash which Staats Company had a right to receive and were of no greater value than the cash.

Learned counsel in his brief says that there is no evidence showing that the Staats Company desired to rescind the transaction. This is entirely beside the point. It had a right so to do and to take back its stock. It had also the right to receive the cash for the stock. It gave up both rights when it accepted the note and deed of trust, and thus gave a present fair consideration therefor.

Counsel make some further observations to the effect that the stock had been hypothecated prior to the giving of the note and deed of trust, the evidence on which they base this claim appearing at page 136 of the transcript, being a statement by Stilson that according to the schedule sixty shares and the due bill were at some time hypothecated. There is no showing as to when they were hypothecated, whether before or after the execution of the note and deed of trust. The *recital* in the schedule quoted by counsel in his brief is certainly not evidence. But even if it was, there is no showing when the transaction occurred or that it was with a *bona fide* purchaser without notice. But since as has already been shown no title passed, both by reason of the fact that the sale was a cash transaction and the purchase price was not paid and also by reason of Stilson's fraud, it is entirely immaterial whether they had been hypothecated or not. Under the authorities already cited, the title still being in the Staats Company, Stilson could pass no title to anyone. Furthermore, however, even if this were not true, Staats certainly would have had a right to rescind the transaction and take back the stock unless the same was in the hands of a *bona fide* purchaser for value without notice. There is not a

suggestion in the record that they were at any time in the hands of a *bona fide* purchaser for value without notice. It is fundamental that this is an affirmative defense which must be established by a clear affirmative showing of the various elements necessary for constituting a *bona fide* purchaser for value without notice. It hardly seems necessary to cite many authorities to this proposition. It is clearly stated in the early case of *Boone v. Chiles*, 10 Pet. 177 U. S., has always been recognized as the law, and was very clearly re-stated in the recent case of *Wright-Blodgett Company v. United States*, 236 U. S. 397. If the trustee claimed they were in the hands of a *bona fide* purchaser for value without notice, the burden was upon it to prove it. The Learned Master fell into error by failing to notice this fundamental proposition, as appears from that part of his opinion reported on page 44 of the transcript. However, as we have several times pointed out, and as is very clearly set forth in *Harkness v. Russell and Rogers v. Bockman*, already referred to, Staats Company would have had the right to take back this stock even from a *bona fide* purchaser.

Authorities might be multiplied, but we shall not consume the time of the court in reviewing more of them.

FOURTH: IRRESPECTIVE OF ALL THE FOREGOING CONSIDERATIONS, THE COURT SHOULD, UNDER SETTLED PRINCIPLES, CONSIDER THE DEALINGS BETWEEN THE STAATS COMPANY AND THE STILSON COMPANY AS ONE TRANSACTION, THE NET RESULT OF WHICH WAS NOT TO DIMINISH THE BANKRUPT ESTATE, WHICH IS, THEREFORE, NOT SUBJECT TO ATTACK.

The proposition just announced is, we submit, thoroughly established by the following authorities:

Jaquith v. Eldon, 189 U. S. 78;

Wild v. Provident Trust Company, 214 U. S. 292;

Peterson, v. Nash, 112 Fed. 311;

Re Saugor, 121 Fed. 658;

Re Dickson, 111 Fed. 726;

McKey v. Lee, 105 Fed. 923;

Re Topliff, 114 Fed. 323;

Morey Mercantile Co. v. Schiffer, 114 Fed. 447.

Jaquith v. Eldon is a much stronger case for the trustee than the case at bar. The same may be said of *Wild v. Provident Trust Company*. In the latter case the true principle applicable to situations of this kind is stated as follows, referring to the *Jaquith* case:

“But the decision in that case was not rested upon the fact of this slight sale subsequent to the last payment. It was rather put upon the broader principle that all the dealings between the creditor and the bankrupt were after the bankrupt’s insolvency, and that their net effect was to enrich the bankrupt’s estate by the total sales, less the total payments.”

This principle is equally applicable to and determinative of the case at bar. Indeed, it is more directly ap-

plicable here, since in both the Jaquith and Wild cases the goods had actually been furnished on credit, while here there was never any agreement of credit, but only a cash transaction. In the case at bar, assuming that the Stilson Company was insolvent, all the dealings occurred after the insolvency, and the Stilson Company received sixty shares of stock worth \$3,870.00 and a due bill for one hundred forty shares. All it gave in return was a note for \$3,870.00 secured by a deed of trust. The net result of the transaction, therefore, was either to enrich the bankrupt's estate or at least not to diminish it. Under the principle announced in the Jaquith and Wild cases, therefore, which principle is fair, just and equitable, the judgment of the court below was clearly right.

We shall not take the time to review extensively the various cases which we have cited from the Federal Reporter. They all recognize and enforce the same broad equitable principle in various states of fact, as will be seen by a reference to them. The case at bar is much stronger for its application, however, for in all of these cases, we believe, the goods had actually been sold to the bankrupt on credit, while in the case at bar the sale was a cash transaction and the vendor never agreed to give credit until the note and deed of trust were accepted. The case at bar is much stronger than any of the cases cited, for here there was no agreement to give credit. It was simply a cash transaction. The possession of the goods was delivered to Stilson only in exchange for what was supposed to be cash, and when it was found that it was not cash, the note and deed of trust were taken in lieu thereof.

The learned Special Master fell into the error of assuming that by reason of the fact that the Staats Company put the check through the bank the second and third time, it thereby extended credit and broke the continuity of the transaction. We believe enough has already been said to show the fallacy of this reasoning. Under this theory, the very cashing of the check would have been just as much subject to the claim that it constituted a preference as is the present transaction. As already several times pointed out, the Staats Company had a right to the cash, and took the note and deed of trust only in lieu thereof.

FIFTH: THERE IS NO SHOWING THAT THE EFFECT OF THE ENFORCEMENT OF THE NOTE AND DEED OF TRUST WILL BE TO ENABLE THE STAATS COMPANY TO SECURE A GREATER PERCENTAGE OF ITS CLAIM THAN "ANY OTHER CREDITOR OF THE SAME CLASS" (IF THE STAATS COMPANY BE DEEMED A CREDITOR), AND, THEREFORE, NO SHOWING THAT THE SAME CONSTITUTES A PREFERENCE.

This must, of course, be shown in any case, in order for the court to find that there was a preference. The burden of proof of establishing all the elements of a preference is, of course, upon the trustee. Collier on Bankruptcy, 10th Ed., page 790, and cases cited. In the case at bar there is *no evidence at all as to the present value* of the property covered by the deed of trust. It does appear that the property was covered by prior mortgages, *the amount of which is not shown*. The only testimony in the record bearing on the matter is the testimony of witness Eakins as to the value of the fee, *not the equity*, in January, 1913 (the case was

tried in March, 1915), and the statement of Stilson, on page 158 of the transcript, that he *told* the Staats Company at the time the deed of trust was given (March, 1912), that the equity in the property was *then* worth probably \$25,000.00. This is not evidence at all, even as to the then value of the property, for it is a mere recital of a statement once made by the witness when he was not even under oath; certainly it is no evidence as to the present value of the equity. Bearing in mind the proposition that the burden of proof is upon the trustee to show all the essential elements of a preference, it is obvious that there is in this case a complete failure of proof on this point. Moreover, even if the recital of Stilson as to the statement that he once made as to the then value of the equity could be taken as evidence of its then value, which we submit it clearly cannot be, still there is no evidence whatever in the record of the present value of the equity. Any number of things might have intervened to diminish the value of the property. Mortgages might have been foreclosed and the property sold; fire might have occurred which would have destroyed practically all the value; there might have been a great diminution in the value of all of the properties for any number of reasons. Bearing in mind the proposition that the burden of proof is upon the trustee to show all the essential elements of a preference and that one of those elements is, in the language of the Bankruptcy Act, section 60, that “the effect of the enforcement of such judgment or transfer *will be* to enable any one of his creditors to obtain a greater percentage of his debt than any other creditors of the same class,” it is obvious, we submit,

that there is a complete failure of proof. As a matter of fact, there *is* no showing as to what “other creditors of the same class” (whatever that may mean in such a case as this) will receive, unless indeed it is a fair inference that they will be paid in full.

SIXTH: THE FINDING OF THE LEARNED TRIAL COURT THAT THE STAATS COMPANY AT THE TIME IT ACCEPTED THE NOTE AND DEED OF TRUST DID NOT HAVE REASONABLE CAUSE TO BELIEVE THAT THE STILSON COMPANY WAS INSOLVENT IS IN ACCORDANCE WITH THE EVIDENCE.

As a matter of fact, it is very doubtful, even after a judicial hearing, whether the Stilson Company was insolvent within the meaning of the Bankruptcy Act; that is, whether the reasonable value of its properties was less than its liabilities. The total liabilities of the company, as shown by the statement, were somewhere between \$250,000.00 and \$260,000.00. How many of these debts may have been barred by the statute of limitations or had other defenses against them is not shown. The real estate owned by the corporation was worth, according to the official appraisement in bankruptcy, \$240,625.00. The statement shows the value in stocks and bonds, exclusive of the stock of the Amalgamated Oil Company out of which the present litigation arose, was \$10,895.00. The Hibernian Bank owed the company nearly \$1,000.00. Its seat on the Stock Exchange was worth \$1,500.00, and Miller owed the company \$1,095.00, which was good. Mary Stilson and Fielding J. Stilson owed the company \$20,000.00. It was shown that Mary Stilson, at least, had some very valuable property. The company owned office

furniture and fixtures worth about \$1,500.00. The Oleum Development Company, a corporation, owed the company \$11,000.00, which was indebtedness incurred in California, and for which the stockholders would be liable. It is not our purpose to go in great detail into the condition of the company, but the foregoing is sufficient to show that there is very substantial doubt as to whether or not the company was in fact insolvent, even after a very considerable judicial examination of the question. From the evidence in this case we submit that it is quite clear that the Staats Company was not charged with having reasonable cause to believe that the company was insolvent. Mr. Jardine testified that Stilson told him the company was in good shape, had a large amount of real estate worth at least a quarter of a million dollars, and its liabilities were at the outside not over \$150,000.00. [See transcript, pages 191 and 2.] As already stated, the official appraisement gave the value of the real estate alone owned by the Stilson Company at over \$240,000.00, so that this part of Stilson's statement was substantially correct. It has been argued that the fact that the check was not honored was itself sufficient to charge the Staats Company with reasonable cause to believe that the Stilson Company was insolvent. This may be true under some circumstances, but under the circumstances in this case, we think it was not true. The evidence shows that both the Stilson Company and the Staats Company were brokers. It further shows that on several prior occasions the Staats Company had received checks from the Stilson Company which had not been paid on first presentation, but which had been paid after a few days.

[Tr. page 195.] It further shows that Mr. Jardine of the Staats Company had made inquiries of leading bankers in Los Angeles as to the financial standing of the Stilson Company, and the answer in both cases was that they were careless about their business methods, but were perfectly good and responsible financially. [Transcript, pages 194-5.] Under these circumstances, the mere fact that the check came back unpaid was not, we submit, sufficient to charge the Staats Company had reasonable cause to believe that the company was insolvent, particularly when it had such very large assets as the evidence showed this company had. As a matter of fact, the basis on which a man is charged with having had reasonable cause to believe that another is insolvent is really one of constructive notice. He certainly ought not be charged with more knowledge than a reasonable diligent inquiry would have disclosed. *Parker v. Parke*, 56 Atl. 1094, 1100; *College Park etc. Co. v. Ide*, 40 S. W. 64, 66; *Webb v. Ins. Co.*, 69 N. E. 1006, 1013. As shown by the evidence here, anyone making a reasonably diligent inquiry into the affairs of the Stilson Company, at that time, would probably have come to the conclusion that it was not insolvent, owing to the large quantities of land and other assets held by the company.

The court, of course, will bear in mind that "reasonable cause to believe" requires something far more than a mere suspicion of insolvency. The rule is well stated in *Grant v. National Bank*, 97 U. S. 80. *McDonald v. Clearwater Shortline Railway Company*, 164 Fed. 1007, decided by Judge Deitrich, in this circuit, is also in

point. In that case, in holding that reasonable cause to believe had not been shown, the court said:

“In the argument counsel for the plaintiff repeatedly refers to the fact that the lumber company was arranging for overdrafts, and was urging the railroad company to hasten payment of invoices, and it is insisted that therefore the lumber company must have been insolvent, and that the bank was aware of such insolvency. But the conclusion does not follow; the aggregate of the property of a debtor, taken at a fair valuation, may be far in excess of the amount of his debts, and still he may not have the current funds with which to meet his indebtedness as it falls due. Here the lumber company may have been doing business upon a large scale with a limited capital, and necessarily some time must elapse before it could realize upon the finished product of the work in which it was engaged. It must incur indebtedness for supplies and for labor, which ultimately could be paid for out of the proceeds of the contract, but which in the meantime must be taken care of with other funds. That it should be arranging for overdrafts, and promising to turn into the bank vouchers and drafts and checks, was not extraordinary, and in itself its conduct in that respect is insufficient to create even a suspicion of insolvency, as the term is used in the bankruptcy law.”

Coder v. Artz, 152 Fed. 943, affirmed 213 U. S. 223, while not quite so directly in point, also has a bearing on the question.

In this case, the trial judge, who it may be fairly assumed knew the parties and what weight should be given their testimony, has held that the evidence did not show that the Staats Company had reasonable cause to believe that the Stilson Com-

pany was insolvent. We submit that this finding is entitled to far greater weight than the finding of the Special Master. In this connection it is to be noted that in this case the reference to the Special Master was made over the objection of defendants. [Tr. p. 32.] At the time the reference was made the present equity rules were in force. Rule 59, as the court is aware, secures to the parties the right to a trial before the court except "upon a showing that some exceptional condition requires" a reference. There was, we submit, no such showing in this case. The showing on which the order was made appears on page 30 of the transcript and showed no exceptional condition or special urgency. There was no showing even that this was the only matter involved in the settlement of the bankruptcy affairs. As a matter of fact, the lack of exceptional urgency is pretty clearly shown by the fact that the order of reference was made in March, 1914, and the case was not brought to trial before the Master until March, 1915. Under these circumstances the finding of the Master ought to have very little, if any, weight as against the finding of the court. It was the duty of the court, particularly under the new equity rule, to consider the evidence and its finding should not, we submit, be disturbed. As a matter of fact, even before the new rules were adopted the same would have been true. It was said by the Supreme Court in *Kimberly v. Arms*, 129 U. S. 512, at page 524:

"It is not within the general province of a Master to pass upon all the issues in an equity case, nor is it competent for the court to refer the entire decision of a case to him without the consent of the parties. It

cannot, of its own motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers.”

See also *Boswell v. Hook* (C. C. A. 7th circuit), 77 Fed. 687. It is submitted, therefore, that this court ought not to disturb the finding of the trial court to the effect that the Staats Company did not have reasonable cause to believe that the Stilson Company was insolvent within the meaning of the present Bankruptcy Act.

At one point in his brief counsel quotes from the answer filed by these appellees, apparently with the idea of impressing the court that in such answer we admitted that the Staats Company was a creditor before the note and deed of trust were taken. If such an impression would be conveyed by the partial quotation counsel makes it is incorrect. On the contrary, these appellees in their answer set out in full the transaction just as the evidence shows it occurred. [See transcript, pages 24 to 27.] The Staats Company did become a creditor of the Stilson Company on the 19th day of March when it accepted the note and deed of trust, as is admitted in our answer, but not prior thereto.

The case of *National City Bank v. Hotchkiss*, 231 U. S. 50, cited by the Special Master, is clearly not in point. In that case the bank made an actual loan to the broker. The court therefore necessarily held that the bank had consented to become a general creditor. Thus on page 58 the court says:

“The consent to become a general creditor for an hour * * * established the loan as a part of the assets.”

That decision, therefore, clearly has no bearing on the case at bar, where the Staats Company did not agree to become a general creditor or extend credit at all, but simply made a cash sale.

We believe sufficient has been said to show that it would be a most unfair, unjust and inequitable thing to set aside this deed of trust which was taken in lieu of the cash to which the Staats Company was clearly entitled, and for which it surrendered title to the stock and the right to retake the same. We further trust that it has been shown not only that the Bankruptcy Act does not require that the court should do so, but that for all the reasons herein discussed it does not permit it, and that the decision of the learned court below was correct. It is not the intention of counsel for appellees to make an oral argument, and they have, therefore, discussed the questions in this brief at some length, but as tersely as they have felt to be consistent with clear exposition. We trust that the same will not be felt by the court to be an undue imposition on its time.

It is respectfully submitted that the order and decree appealed from should be affirmed.

O'MELVENY, STEVENS & MILLIKIN,
WALTER K. TULLER,

Attorneys for Appellees.

No. 2691.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

Security Trust & Savings Bank, a
corporation, as Trustee in Bank-
ruptcy of Fielding J. Stilson
Company, a corporation, Bank-
rupt,

Appellant,

vs.

William R. Staats Company, a cor-
poration, and Title Insurance and
Trust Company, a corporation,

Appellees.

APPELLEES' PETITION FOR REHEARING.

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APPELLEES' PETITION FOR REHEARING.

*To the Honorable, the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:*

The appellees in the above-entitled cause respectfully
petition for a rehearing.

With all due respect to the court, we are convinced
that the court has fallen into grievous error in its de-
cision on the questions of law presented, and thereby
has not only established a bad precedent but that its
decision will, if allowed to stand, work a most grievous

injustice upon the parties to this cause. It may be that counsel for appellees themselves were guilty of an error of judgment in not arguing the case orally to the court. We attempted to present the matter clearly in our brief and felt that the legal soundness, as well as the justice, of the decision of the learned District Court was so clear that we would hardly be warranted in consuming the time of the court in an oral argument. From the opinion rendered, however, we must have failed in our brief to elucidate clearly the legal questions involved, and also the facts disclosed by the somewhat voluminous record, for we cannot believe that if we had made them clear the court would have rendered such a decision as it has. We shall endeavor, therefore, with all due respect to the court, and as briefly as consistent with the importance of the case, to point out what we conceive to be the errors of law and misconceptions of fact in the decision heretofore rendered.

As we Read the Opinion, the Court Concedes that the Staats Company Surrendered or "Abandoned" its Right to Retake the Stock When it Accepted the Note and Deed of Trust. Irrespective of Everything Else, this Constituted a "Present Fair Consideration" Which Prevents the Transaction From Being a Preference, and Prevents it From Being Set Aside.

We shall consider this matter first, although somewhat out of its logical order. In connection with this matter the court says in its opinion (latter part):

"That part of the argument made by the appellees in support of the action of the District Court wherein

the point is made that the giving of the check by the Stilson Company was a representation that that corporation had sufficient funds to meet the check, and that, such representation not being true, a fraud was perpetrated on the Staats Company, and that title remained in the Staats Company and did not pass until the note and deed of trust were accepted, has received our careful consideration. But whatever right of rescission existed because of misrepresentation by the Stilson Company in giving the check, *was abandoned by the position taken when security was accepted for the purchase money.*"

That this right was abandoned or released by taking, and when we took, the security is of course true. *But by the very fact of abandoning or releasing this right to retake the stock we gave a "present fair consideration" for the note and deed of trust.* We respectfully submit that there can be no escape from this conclusion. We had a right to take back the stock. The stock was worth at least as much as (indeed the stock and due bill together were worth a great deal more than) the amount of the note to secure which the deed of trust was given. We released and surrendered the right to retake the stock and permitted title to it to pass, in consideration of the execution and delivery of the note and deed of trust. How can it possibly be contended, therefore, that we did not give a present fair consideration for the note and deed of trust?

Section 67e of the Bankruptcy Act provides that transfers or encumbrances for a present fair considera-

tion are not invalid. Authorities might be multiplied almost without number to the proposition decided in *Cook v. Tullis*, 18 Wall. 332, that: "A fair exchange of values may be made at any time, even if one of the parties is insolvent." See also *McDonald v. Clearwater*, 164 Fed. 1011.

Having a right to take back the stock, which was worth as much as if not more than the security, there could not be, and was not, we submit, any preference in our taking a note and security therefor not greater in amount than the value of that which we had the right to retake. If we chose to exercise our right to take back the stock, the Stilson Company, or the bankrupt estate, would not have owed us anything, *but would have been deprived of stock of the value of at least as great as the amount of the note*. If we had sold it the stock, taking a note secured by a mortgage or deed of trust for its value, there could not possibly be any preference. This was in effect exactly what we did. We allowed it to purchase the stock, and passed title thereto, which we would otherwise have had the right to retake, in consideration of the execution of the note and deed of trust. Everything is apparently conceded in the opinion of the court except the conclusion, which is not mentioned. We feel it must be that we failed to make clear to the mind of the court the point we are now urging, for the conclusion seems to us to follow inevitably.

The authorities cited by us in our brief clearly establish that we had the right to take back the stock. This right existed on any one of three grounds: 1st. That the sale being a cash transaction, title did not pass

until actual payment, and therefore that title did not pass in contemplation of the law until the note and deed of trust were accepted. 2nd. Possession of the stock having been obtained by Stilson's fraud in giving a bad check, no title passed. 3rd. Even if it were true that title had passed, nevertheless by reason of the fraud in giving a bad check we had the right to rescind the transaction and take back the property.

It has never been questioned, and is not, we understand, questioned by the opinion of this court, that the transaction was a cash transaction. It was expressly so found by the Master [Tr. p. 42] where he says "the sale was a cash transaction," and it cannot of course be questioned. The authorities cited by us in our brief, pages 7 to 14, inclusive, establish beyond the question of a doubt that where a sale is a cash transaction no title passes, even though possession does pass, until actual payment of the money, and the fact that a check is given does not affect this rule. In our brief we reviewed a number of these authorities at considerable length. None of them are referred to in the opinion, nor indeed is this proposition of law but barely mentioned. We respectfully urge the court to read the pages of our brief indicated and the authorities there cited in connection with this petition. We would particularly call attention to the statement of law in the case of *Sprague Company v. Fuller*, 158 Fed. 588, decided by the Circuit Court of Appeals of the Fifth Circuit. That case involved a sale of machinery for cash, possession having been delivered. The vendee was declared bankrupt, he not having made payment. In holding that the vendor had the right to retake the property, the court said:

“We concur with the learned district judge that ‘there is no doubt about the proposition that, where personalty is sold for cash on delivery, the payment stipulated for is a condition precedent, and, unless complied, the seller may reclaim the property.’ We think it is settled law that ‘“where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer.’ Benjamin on Sales (3d Ed.), Sec. 320.”’ And it has been held by controlling authority that, where goods were sold to be paid for in cash or securities on delivery, ‘the sales were conditional only, and that the vendors were entitled to retake the goods, even after delivery, if the condition was not performed, the delivery being considered as conditional.’” (Citing *Harkness v. Russell*, 118 U. S. 663, where, after an elaborate review of the authorities, it is so decided.)

All of the authorities cited in our brief show that the effect of a cash sale where possession is delivered and payment is not in fact made is practically that of a conditional sale. The authorities are all to the effect that title remains in the vendor until the price is actually paid and hence the retaking of the property or accepting payment of its value does not and cannot constitute a preference.

The latest decision with which we are familiar is *Bailey v. Baker Ice Machine Co.*, decided by the Supreme Court of the United States November 29, 1915, and reported in U. S. Supreme Court Advance Opin-

ions at page 50. It there held that the taking back of the property so sold, even from a bankrupt, cannot constitute a preference. Of course since the taking back of the property does not constitute a preference, the acceptance of its value either in money or in a secured note, cannot constitute a preference. *Hewitt v. Berlin Machine Wks.*, 194 U. S. 296, is another decision squarely in point.

As a matter of fact we believe it cannot be doubted under the authorities that no title whatever passed until the note and mortgage were accepted, and therefore the transaction was in legal effect exactly the same as if we had sold the property upon condition that they execute the note and mortgage, which no one could contend would constitute a preference. We desire again to point out that this is not even mentioned in the opinion unless the language first quoted can be deemed a mention of it.

But entirely irrespective of this point, since we had the right to take back the property for the other reasons heretofore stated, the surrender of that right constituted a present fair consideration of the note and deed of trust. The court does not attempt to refute the proposition urged by us that the Stilson Company perpetrated a fraud on us by giving a check which was not good. Under the authorities cited in our brief it cannot, we submit, be questioned that this constituted a fraud. It is the settled law of California, as well as the general law, that where property is so obtained by fraud no title passes. See particularly *Amer v. Hightower*, 70 Cal. 440. For this reason again we had the right to take back the property, and the title

did not pass and the sale was not in legal contemplation made until the note and deed of trust were given and accepted. At this moment and not before the sale was consummated and title passed. But even assuming that title did pass, certainly by reason of this fraud we had the right to rescind the transaction and take back the stock, and the surrender of this right was a present fair consideration.

We feel that it is not an unfair statement to say that these points are not considered at all in the opinion of the court. Certainly there is no discussion whatever of the legal principles involved. As before stated, we feel that it must be true that we did not discuss them at sufficient length in our brief to make our point clear, but we trust that we have here presented it so that the court will appreciate the force of the point.

The Sale was Not Made in Contemplation of Law and Title Did Not Pass Until the Note and Deed of Trust were Executed and Accepted, for Two Reasons: First, the Sale Being a Cash Transaction, Title Did Not Pass Until Actual Payment or Until our Acceptance of the Note and Deed of Trust in Lieu of Payment in Cash. Second, Possession Having Been Secured by the Fraudulent Representation of Stilson in Giving a Bad Check, he Acquired No Title Until we Accepted the Note and Deed of Trust in Lieu of the Cash.

In the discussion of the first point urged in this petition we have necessarily somewhat covered this point.

As heretofore pointed out the transaction of purchase and sale here involved was a cash transaction.

The law is thoroughly settled that in such a transaction no title passes until payment in cash is actually made, and the giving of a check does not operate to pass title. In our brief, pages 7 to 14, we have reviewed a considerable number of the leading cases establishing this proposition. We desire not unduly to extend the scope of this petition by repeating here what we have set out in the brief, but we refer the court to those pages of our brief, and respectfully urge that Your Honors read the review of the law therein set out. The authorities there cited establish beyond question, we submit, that title to the stock remained in the Staats Company. Title being in that company, it agreed that upon the execution and delivery of the note secured by the deed of trust, title should pass to the Stilson Company. In contemplation of law, therefore, the sale was consummated at that time. The consideration for the passing of title was the secured note. That such a transaction cannot constitute a preference seems to us so clear as hardly to require argument. The stock was worth at least \$3870.00. We passed title to it on consideration of the execution and delivery of the secured note, which was worth not more than \$3870.00. As heretofore pointed out, the authorities are all to the same effect as *Cook v. Tullis*, 18 Wallace 332: "A fair exchange of values may be made at any time even if one of the parties is insolvent." We wish again to emphasize that it is not even claimed that the note was for a larger sum than the value of the property. It is admitted that the value of the sixty shares, even eliminating the due bill for 140 shares, was \$3870.00, the

amount of the note. This point and the authorities supporting it are not even mentioned in the opinion.

The same result flows from the fact that possession of the property was secured through the fraud of Stilson giving a bad check. As already pointed out, and as shown on pages 15 and 16 of our brief, where possession is so secured by fraud no title passes. That the giving of the bad check constituted fraud cannot be questioned. For this reason also, therefore, title remained in the Staats Company until the secured note was given and accepted. As heretofore pointed out, the transaction was in all substantial respects exactly like a conditional sale, possession being in the vendee and title remaining in the vendor. It is thoroughly settled that in such a case the retaking by the vendor of the property or the acceptance by him of its value is not a preference. Preferences exist only when the estate of the bankrupt is diminished.

“The preferential transfer must result in the depletion of the debtor’s estate, so as to leave the other creditors without property out of which their claims may be paid. If there is no depletion of the estate the creditors cannot complain.”

Collier on Bankruptcy, 10th Edition, page 86.

In a case like the one here, it is not diminished, for the vendor gives up the right to retake property of the same value which he receives, and passes title thereto to the bankrupt.

Even if Every Other Consideration was Resolved Against us the Evidence Does Not Show that the Transaction Constituted a Preference for it Fails to Show that the Effect of the Enforcement of the Note and Deed of Trust Will be to Enable the Staats Company to Secure a Greater Percentage of its Claim than "Any Other Creditor of the Same Class".

An encumbrance or transfer, even if all other essential elements exist, does not constitute a preference under the statute unless "the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

Bankruptcy Act, section 60a.

The rule is stated in Collier on Bankruptcy, 10th Edition, page 790, as follows:

"Since the amendatory act, a preference consists in a person, (1) while insolvent and (2), within four months of the bankruptcy, (3) procuring or suffering a judgment to be entered against himself or making a transfer of his property, (4) the effect of which will be to enable one creditor to obtain a greater percentage of his debt than any other creditor of the same class. Such a preference is voidable at the instance of the trustee, if (5) the person recovering it or to be benefited thereby has (6) reasonable cause to believe that the enforcement of the judgment or transfer will result in a preference."

Of course, it is thoroughly settled as stated by the same author on the same page that

“The burden of proving the existence of the essential elements of a transfer is upon the trustee seeking to avoid it.”

All that the court says about this matter in the opinion in the case at bar is the following:

“The evidence shows that the effect of the enforcement of the mortgage given by the Stilson Company when insolvent would be to give to the defendant, the Staats Company, a greater percentage of its claim against the bankrupt than any other creditors of the same class.”

We cannot believe that in making this statement the court appreciated the effect of the record, for with all due respect we submit that it does not at all justify the statement or holding. Even assuming that the Staats Company was an ordinary creditor, or any creditor of the Stilson Company, at the time the note and deed of trust were given, it was necessary for the trustee to prove at least two things in order to meet the burden which was upon it to establish that the note and deed of trust constituted a preference, namely: (1) to show “what other creditors of the same class” would receive; (2) to show how much the Staats Company will receive if the deed of trust is enforced, and that this will be a greater percentage of its debt than “other creditors of the same class” will receive. We respectfully but most earnestly insist that neither was shown. We do not believe there is any competent evidence at all in the record bearing on the question of how much “other creditors of the same class,” whatever that may mean in this case, will receive. We know of no evi-

dence in the record except the schedule filed by the bankrupt, and we know of no rule which makes this schedule, which is practically an *ex parte* statement, evidence at all in an independent action such as this. But even assuming that it is evidence, it absolutely fails to furnish the proof which the trustee was required to make. This schedule is set out in the transcript, pages 63 to 107. Its summary set out on pages 63 and 64 shows indebtedness of \$257,760.87 and assets of a value of \$280,298.11. There was no evidence other than this statement as to the amount of the indebtedness. There was no proof as to the number of claims presented or allowed. Any part of the indebtedness may not be allowable or provable claims. Any amount may be barred by the statute of limitations or subject to other defenses. *There is no evidence at all on these points.* The assets of the company consisted of real property and various items of personal property. Mr. W. W. Eakins, one of the appraisers of the Bankruptcy Court, was called to the stand, and testified that he and his fellow appraisers appraised the real estate owned by the bankrupt and valued the same at \$272,125.00. [Tr. p. 210.] It is true that he testified [p. 212] that included in this sum were certain properties claimed to be owned by Fielding J. Stilson, the president of the company, and Mary Stilson, the mother of said Fielding J. Stilson, such properties being valued at \$31,500.00. But deducting this sum from the appraisement of the entire properties left a value for the remaining properties of \$240,625.00. Said Mary Stilson owed the bankrupt company \$13,000.00. [Pp. 128 and 129.] Fielding J. Stilson

himself owed the company \$7000.00. [P. 129.] Hence it appeared that they both then owned the property of a value in excess of \$31,000.00, and owed the company about \$20,000.00. It is only fair to assume that said claims were of some value, the fair assumption being, we submit, that they were worth par. Certainly there is no evidence that they could not be collected. Be that as it may, however, it appears that the real estate alone was of a value in excess of \$240,000.00. Of course, if we add the amount owed to the company by Mary Stilson and Fielding J. Stilson, this is brought up to over \$260,000.00. The schedule shows a value in stocks and bonds owned by the bankrupt of \$10,895.60. [Tr. pp. 102, 104.] The bills, personal notes and securities amounted to \$23,802.54. [Tr. pp. 97, 98.] The Oleum Development Company owed the bankrupt \$11,040.50. [Tr. p. 100.] This was for money advanced to the corporation in California, and the company had a large number of California stockholders. [Tr. p. 41.] There was no showing that the whole or a large part of this money could not be collected from such stockholders. The company had about \$940.00 in cash on hand. [P. 168.] It owned a seat on the Stock Exchange of a value of \$1500.00. [P. 169.] There is thus shown a total value of \$277,762.00, eliminating entirely the debt owed by the Oleum Development Company, and the debts owed by Fielding J. Stilson and his mother. If these are added there is a total value of assets of about \$298,000.00. As we have already shown, it was incumbent upon the trustee to show what other creditors of the same class as the Staats

Company, assuming the Staats Company to be a creditor, would receive. From this review of the evidence, we submit that if any conclusion at all can be drawn, the only fair conclusion is that they will be paid in full or practically in full.

Coming now to the second matter which it was necessary for the trustee to prove, namely, the amount which the Staats Company will receive if the security is enforced, we find the evidence in even a worse situation for the trustee. As a matter of fact, *there is no evidence at all as to the present value of the properties covered by the deed of trust.* The properties on which the deed of trust was taken were covered by first mortgages, which are liens prior to the deed of trust, *and the amount or amounts of those mortgages are not shown.* [Tr. p. 158.] The only evidence in the record as to the value of the property is the statement of Mr. Eakins that in or about January, 1913, he and the other appraisers of the Bankruptcy Court placed certain valuations upon the *fee*, not upon the equity, of these properties. The amount of the first mortgage or prior encumbrance not being shown, this throws no light upon how much will be secured by the Staats Company from the enforcement of the deed of trust. Moreover this valuation was placed in January, 1913; the trial occurred in March, 1914. Any number of things might have occurred in the meantime to depreciate the value of the properties. Changes in business conditions, fires, or any number of things might have intervened to cause a great depreciation. Therefore, this evidence is entirely insufficient to meet the issue. The only other thing in the record that bears

at all on the subject is the statement of Mr. Stilson, appearing on page 158 of the transcript, that in March, 1912, two years before the trial, he told Mr. Coggeshall that the equity in the properties was probably worth from twenty to twenty-five thousand dollars. This was an *ex parte* statement, not under oath, and is, we submit, no evidence at all of the value. Mr. Stilson did not attempt to testify as to the value when he was on the stand.

Bearing in mind that it is essential in order to establish a preference that it be affirmatively proved by the trustee that the enforcement of the security will result in the alleged preferred creditor securing a greater percentage of his claim than other creditors of the same class, we submit there is in this case an absolute failure of proof. How can this court or any court determine, from the evidence here, how much other creditors of the same class as the Staats Company will receive, and how much that company will receive, if the security is enforced? This is true even if we assume that the only claim that the Staats Company had was the claim for \$3870.00. As a matter of fact, however, they had outstanding as part of the transaction a due bill for 140 shares of the stock of the Amalgamated Oil Company, which was worth at that time \$64.50 per share, or a total of \$9030.00. This matter has received no consideration. The fact about to be stated does not appear on the record for the reason that it has developed since the trial, but we feel it is appropriate nevertheless to call it to the court's attention as strikingly illustrating the failure of proof in this case. *The fact is that there is now pending against*

the Staats Company a suit based on this very due bill. The case has not been decided but the action has been commenced and is pending. How can this court, or any court, say, from the evidence in this record, how much other creditors of the same class will secure, unless indeed it should hold that from the evidence the only fair inference is that they will be paid in full? How can it say how much will be secured by the Staats Company from the enforcement of this deed of trust, or that it will receive a greater percentage of its debt than other creditors of the same class?

We respectfully submit that there is absolute failure of proof upon this vital and essential point.

This is true even if we accept the position strongest in favor of the trustee and consider the Staats Company as a creditor. Under such view who are creditors "of the same class"? This language of the statute means something. It is obviously not intended to put every creditor on the same plane. In such a case as this we submit the fair construction to give to the words is creditors who have a right of rescission or a right to take back property sold. If this view be correct there is no evidence at all what other creditors of this class there may be or what they will receive.

But we respectfully urge that the Staats Company was not a creditor at all in the sense the word is used in the statute. It stood rather, as we have heretofore shown, in the position of a vendor under a contract of conditional sale. It had parted with possession of certain personal property. It had a right to receive the price thereof, but the title to the property remained in the Staats Company, and it had a right to retake it

if the price was not paid. The taking of possession could not constitute a preference. Hence, security taken in consideration of the surrender of this right and upon which title passed, cannot constitute a preference.

Irrespective of All the Foregoing Consideration the Court Should Under Settled Principles Consider and Treat the Dealings Between the Staats Company and the Stilson Company as One Transaction, the Net Result of Which was Not to Diminish the Bankrupt Estate, and Which is, Therefore, Not Subject to Attack.

In our brief, pages 20 to 22, we presented a number of authorities supporting this proposition. It is not even mentioned in the opinion. With all due respect, we are convinced that it is absolutely sound. In our brief we merely cited a number of the leading authorities. The court not having mentioned the point, we crave indulgence briefly to review some of them.

Jaquith v. Eldon, 189 U. S. 78. In this case certain goods and merchandise had been sold and delivered to an insolvent *on credit* and thereafter and while the buyer was insolvent and within four months before the filing of the petition certain payments on account were made and certain additional goods delivered, all on credit. It was held that the payments did not constitute a preference but that the entire matter should be treated as one transaction, the result of which was not to diminish the estate of the bankrupt, and that it was, therefore, not subject to attack.

Wild v. Provident Trust Co., 214 U. S. 292. In this case certain goods had been sold *on credit* after the bankrupt was insolvent and various payments had been made, the last payment being made *after the last delivery of any goods*, and all within four months prior to the filing of the petition. It was held that this did not, and even the last payment did not, constitute a preference, but that the whole dealing should be considered as a single transaction. The court said:

“The single question in the case is whether that payment was a preference. It is conceded that it would not be a preference, in view of the other facts in the case, if it had been followed by a sale and delivery of goods of any value, however small. This concession is made necessary by the decision in Jaquith v. Alden, 189 U. S. 78, which is, in all respects, like the present case, except that two days after the payment, which was alleged to be a preference, merchandise of trifling value was sold and delivered to the bankrupt. But the decision in that case was not rested upon the fact of this slight sale subsequent to the last payment. *It was rather put upon the broader principle that all the dealings between the creditor and the bankrupt were after the bankrupt’s insolvency, and that their net effect was to enrich the bankrupt’s estate by the total sales, less the total payments.*” (Italics ours.)

It is to be noted that in both of these cases, the sale was actually made on credit. The case at bar is immensely stronger for us than were these two cases, for here the sale was a cash transaction.

Peterson v. Nash Bros., 112 Fed. 311. This is a decision by the Circuit Court of Appeals of the Eighth Circuit. In this case goods had been sold *on credit* and afterwards and within four months payment on account had been received. It was held that such payments did not constitute a preference, but that the entire dealing should be considered as one transaction.

In re Sagor, 121 Fed. 658. This is a decision by the Circuit Court of Appeals of the Second Circuit. This was a very similar case, goods being sold on credit and payment received on account within four months prior to filing of the petition. There is a considerable review of authorities. It was held that the same did not constitute a preference, but that the entire dealing should be regarded as constituting a single transaction.

M'Key v. Lee, 105 Fed. 923. This is a decision by the Circuit Court of Appeals of the Seventh Circuit. The facts were similar and the decision was the same. The court pointed out this was a just and reasonable construction.

“It leaves the estate unimpaired; for the property of the creditor coming into the debtor's estate is presumably the equivalent of the money value at which it was purchased.”

We submit that in the case at bar, even more than any other cases which we have cited, the principle therein announced and followed should be applied. In all the cases we have cited the sale was made on credit. Title passed to the vendee before any payment was made. In the case at bar the sale was a cash trans-

action. No title passed until payment in the form of a secured note was given and accepted. If we assume that the Stilson Company was insolvent at all, all of the dealings occurred after its insolvency, and through the transaction the company secured stock of a value of \$3870.00, a due bill for 140 shares of whatever value it had, and became liable to pay only \$3870.00. The language of *Wild v. Provident Trust Company, supra*, is directly applicable to the case at bar.

“But the decision in that case (Jaquith case) was not rested upon the fact of this slight sale subsequent to the last payment. *It was rather put upon the broader principle that all the dealings between the creditor and the bankrupt were after the bankrupt's insolvency, and that their net effect was to enrich the bankrupt's estate by the total sales, less the total payments.*”

Here, if we assume the Stilson Company to have been insolvent at all, “all the dealings between the creditor and the bankrupt were after the bankrupt's insolvency, and their net effect was to enrich the bankrupt's estate” by the difference between the value of the 60 shares of stock plus the due bill for 140 shares, and \$3870.00. Certainly the bankrupt's estate was not depleted by the transaction, for even if the due bill were treated as absolutely worthless, the bankrupt received stock worth \$3870.00, and only gave a promise to pay the same amount. If it had paid cash for the stock, then under these decisions there can be no question that the payment would have been valid and not preferential. It gave, and the Staats Company accepted, the note simply in lieu of the cash which

the Staats Company might have lawfully received and retained.

The fact that the Staats Company put the check through the bank twice after the first time cannot, we submit, change this rule. Under the principle of the Wild case, that all the transactions occurred after the insolvency—and the net result was to enrich or at least not deplete the bankrupt's estate, this consideration is obviously beside the point. So it is indeed we submit under any view. The Staats Company had a right to the money. The Stilson Company said "if you will put the check through the bank again we will have the money for you." How can it be said that the Staats Company lost any rights by so doing? The check was not payment. Neither did putting it through the bank constitute payment. Title was still in the Staats Company. It cannot be held to have waived any rights by putting it through the bank the second time any more than by putting it through the first time. Certainly the fact that it put the check through the bank the second time did not operate to pass title to the stock any more than the fact that it put it through the first time had such effect. The transaction was such that under the law no title passed until the money was actually received. *Indeed to hold otherwise the court would necessarily have to hold that if the check had been cashed this very fact would have amounted to a preference, for the note and deed of trust were taken simply in lieu of the cash, to which we were certainly entitled.*

The case here presented is very similar to the case of *Sawyer v. Turpin*, 91 U. S. 114. In that case a bill of sale had been given by the bankrupt which gave to Turpin the right to take possession of the property. Thereafter and within four months prior to the filing of the petition a chattel mortgage was executed by the bankrupt to Turpin in consideration of which he surrendered his bill of sale and right to take possession of the property. It was held that this security did not constitute a preference. The court said:

“It is too well settled to require discussion, that an exchange of securities within the four months is not a fraudulent preference within the meaning of the Bankrupt Law, even when the creditor and the debtor know that the latter is insolvent, if the security given up is a valid one when the exchange is made, and if it be undoubtedly of equal value with the security substituted for it. This was early decided with reference to the Massachusetts insolvent laws (*Stevens v. Blanchard*, 3 Cush. 169); and the same thing has been determined with reference to the Bankrupt Act. *Cook v. Tullis*, 18 Wall. 340; *Clark v. Iselin*, 21 *id.* 360; *Watson v. Taylor*, 21 *id.* 378; and *Burnhisel v. Firman*, 22 *id.* 170. The reason is, that the exchange takes nothing away from the other creditors. It is, therefore, not in conflict with the thirty-fifth section of the act, *the purpose of which is to secure a ratable distribution of the property of a bankrupt owned by him at the time of his becoming bankrupt*, and undiminished by any fraudulent preferences given within four months prior thereto.” (Italics ours.)

In the case at bar the Staats Company had a right, as already shown, to take back the stock and in addition still hold title thereto. When it gave up this right and passed title to the stock in exchange for the secured note, the transaction was in effect merely an exchange of securities. Certainly the exchange took “nothing away from the other creditors.” Equally it did not infringe on the purpose of the act, which, as stated in the case cited, is to “secure a ratable distribution of the property of a bankrupt owned by him at the time of his becoming bankrupt.” The whole transaction, as heretofore pointed out, occurred after the insolvency, if, indeed, the Stilson Company can be considered as having been insolvent at all.

Perkins v. Maier & Zobel Brewing Co., 133 Cal. 496, is a quite similar case. There a chattel mortgage had been given with a right to take possession upon breach. Possession was taken shortly before insolvency proceedings. It was held as against the assignee in insolvency that the possession dated from the date of the execution of the mortgage, that is, from the date when the right to possession accrued. The case at bar is indeed much stronger than the case cited.

Christ v. Sawyer (Penn.), 61 Atl. 822, is also in point. There a bill of sale was given which gave a right to possession, but possession was not actually taken until within four months of the filing of the petition in bankruptcy. It was held that the taking of possession did not constitute a preference, and amounted to a mere exchange in the form of the se-

curity. The opinion considers the question carefully and cited numerous decisions of the United States Supreme Court.

In the case at bar, as already pointed out, the Staats Company did have security even if it be deemed a creditor, in that it had a right to retake the stock and also held title to the stock. When it surrendered these in consideration for the secured note, it was a mere exchange of securities, which, we submit, cannot be held to constitute a preference.

The Evidence was Ample to Support the Finding of the Learned District Court that the Staats Company Did Not Have Reasonable Cause to Believe that a Preference was Intended.

We feel so strongly that the points heretofore discussed are sufficient to entitle us to an affirmance of the judgment that we hesitate to discuss this point at length, but feel that its own merit entitles it, and that fairness to the learned District Court requires us, to make some reference to it. The rule is not that a mere suspicion of insolvency will invalidate a transaction of this character. It must be based on a reasonable cause to *believe*. The rule has never been better stated than by the Supreme Court in *Grant v. National Bank*, 97 U. S. 80. Here the court says:

“Some confusion exists in the cases as to the meaning of the phrase, ‘having reasonable cause to believe such a person is insolvent.’ *Dicta* are not wanting which assume that it has the same meaning as if it had read, ‘having reasonable cause to suspect such a person is insolvent.’ But the two

phrases are distinct in meaning and effect. It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further; he may feel anxious about his claim, and have a strong desire to secure it,—and yet such belief as the act requires may be wanting. Obtaining additional security, or receiving payment of a debt, under such circumstances, is not prohibited by the law. Receiving payment is put in the same category, in the section referred to, as receiving security. Hundreds of men constantly continue to make payments up to the very eve of their failure, which it would be very unjust and disastrous to set aside. And yet this could be done in a large proportion of cases if mere grounds of suspicion of their solvency were sufficient for the purpose.

“The debtor is often buoyed up by the hope of being able to get through with his difficulties long after his case is in fact desperate; and his creditors, if they know anything of his embarrassments, either participate in the same feeling, or at least are willing to think that there is a possibility of his succeeding. To overhaul and set aside all

his transactions with his creditors, made under such circumstances, because there may exist some ground of suspicion of his inability to carry himself through, would make the bankrupt law an engine of oppression and injustice. It would, in fact, have the effect of producing bankruptcy in many cases where it might otherwise be avoided.

“Hence the act, very wisely, as we think, instead of making a payment or a security void for a mere suspicion of the debtor’s insolvency, requires, for that purpose, that his creditor should have some reasonable cause to believe him insolvent. He must have a knowledge of some fact or facts calculated to produce such a belief in the mind of an ordinarily intelligent man.”

Now, what were the facts in the case at bar. A check for a very considerable sum of money, over \$12,000.00, had been dishonored. It was not like the dishonor of a small check. The company might have had a very large balance in the bank and still not enough to meet a check of this size. Moreover, it was not the first time that this occurred. The Staats Company and the Stilson Company were both brokers in Los Angeles. The evidence shows that several times before in their dealings checks had been dishonored and later been paid out in full. [Tr. p. 195.] The Stilson Company had large holdings of valuable real estate, stocks, bonds and other property, and, as the evidence shows, was actively engaged in business. Its real estate alone was worth approximately a quarter of a million dollars. Its holdings were so large, indeed, that, as heretofore shown, after a judicial hearing it

was extremely doubtful whether it was in fact insolvent. The evidence shows that Mr. Jardine of the Staats Company had made inquiries of leading bankers in Los Angeles as to the financial standing of the Stilson Company and the answer was that they were careless about their business *methods* but were perfectly good and responsible financially [Tr. pp. 194-5], and that the reputation of the company on the Stock Exchange and in financial circles was good. [Tr. pp. 195-6.] Under the rule announced in the Grant case, *supra*, we submit that the evidence was amply sufficient to justify the holding of the learned District Court that the Staats Company did not have reasonable cause to believe that the Stilson Company was insolvent, and should lead this court to make the same finding. We have not here the case of a man or company operating on a "shoe string." On the contrary, here was an established corporation engaged largely in business with visible assets worth approximately a quarter million dollars. A corporation which, indeed, as heretofore pointed out, after a judicial hearing, it was very difficult to say whether or not it was insolvent. Under such circumstances, we submit, there ought to be a great deal more than is shown in the record here before a man should be charged with having a reasonable cause to believe that the same was insolvent. It is true Mr. Stilson himself gave some evidence of conversations with representatives of the Staats Company. Even those conversations, however, simply tended to show temporary financial embarrassment, not by any means insolvency, and it is to be borne in mind

that those conversations were denied by the representatives of the Staats Company. Certainly the trial court, who may be presumed to know the parties and their credibility and the weight to be given to their testimony, respectively, ought to be entitled to much consideration by this court. As we pointed out in our opening brief, page 28 and 29, this case was improperly referred to the master. The parties were entitled to the judgment of the District Court. They were so entitled to such judgment and it was the duty of the District Court to pass judgment on the testimony when it came before him. See authorities cited in appellees' brief, pages 28 and 29. He has done so presumptively with a knowledge of the weight to be given to the testimony of each. Under the state of facts presented by this record, we submit that the court should sustain the determination of the learned district judge that the Staats Company did not have reasonable cause to believe that the Stilson Company was insolvent.

There is one other matter not coming perhaps directly under any of the heads which we have discussed that needs a moment's consideration. In the opinion it is stated that the evidence sustains the finding to the effect that the due bill for 140 shares and also the 60 shares of stock had been hypothecated. We are not sure that this is at all important, but in any event we cannot believe that the fact in the records has been fairly appreciated. The evidence on this subject is the mere statement of Mr. Stilson, appearing on page 136 of the Transcript, that "according to the statement 60 shares and the due bill, making 200, had

been hypothecated.” Now, we submit that a purported statement of facts in a schedule is not evidence. Moreover, this was no testimony at all. The law does not contemplate that in making a schedule recitals of business transactions shall be set forth. Even assuming that the schedule might be some evidence as to the amount of the property owned by and the debts owed by the bankrupt, this is all that the law contemplates shall be included in a schedule. Certainly outside recitals can be no more than *ex parte* statements, and not evidence at all as to the outside transactions which they purport to relate.

But even if this was considered evidence that they had been hypothecated there is no evidence at all as to when they were hypothecated *or that they had passed into the hands of a bona fide purchaser for value without notice*. This latter is essential to effect any change in the rights of the Staats Company. We think the matter could only be material as a basis of a claim that the Staats Company no longer had the right to rescind and take back the stock. But it would lose this right *only if the shares had passed to the hands of a bona fide purchaser for value without notice*, and if the trustee made this claim the burden of proof was upon it to establish the facts. On page 19 of our brief we cite several authorities to this effect. It is so fundamental as hardly to require citation of authorities that the defense of *bona fide* purchaser for value without notice is a defense which must be pleaded and proved by the person relying upon it. This is established by authorities almost innumerable. As was

said in *Wright-Blodgett Company v. United States*, 236 U. S. 397, at page 403 *et seq.*, referring to the defense of *bona fide* purchaser for value (in a case involving a patent to land):

“But this is an affirmative defense which the grantee must establish in order to defeat the government’s right to the cancellation of the conveyance which fraud alone is shown to have induced. The rule as to this defense is thus stated in *Boone v. Chiles*, 10 Pet. 177, 211, 212: ‘In setting it up by plea or answer, it must state the deed of purchase, the date, parties, and contents briefly; that the vendor was seized in fee, and in possession; the consideration must be stated, with a distinct averment that it was *bona fide* and truly paid, independently of the recital in the deed. Notice must be denied previous to, and down to the time of paying the money, and the delivery of the deed; and if notice is specially charged, the denial must be of all circumstances referred to, from which notice can be inferred; and the answer or plea show how the grantor acquired title. * * * The title purchased must be apparently perfect, good at law, a vested estate in fee simple. * * * It must be by a regular conveyance; for the purchaser of an equitable title holds it subject to the equities upon it in the hands of the vendor, and has no better standing in a court of equity. * * * Such is the case which must be stated to give a defendant the benefit of an answer or plea of an innocent purchase without notice; the case stated must be made out, evidence will not be permitted to be given of any other matter not set out.’”
(Citing numerous additional authorities.)

Even if it be considered, therefore, that Mr. Stilson's statement as to what is in the schedule is competent evidence of the fact that the stock had been hypothecated, there is no evidence at all that it had passed to a *bona fide* purchaser for value without notice, and therefore it fails to establish any defense to our right of rescission.

The court further in its opinion apparently recognizes that the secured note was taken in lieu of cash and that thereby the Staats Company confirmed the sale. This simply means, as we have pointed out, that the title then passed. This being true there could be no preference. The sale was actually made in contemplation of law when the secured note was accepted and we gave as consideration therefor the title to the stock. This, too, is apparently conceded in the opinion, where the court says, referring to the effect of accepting the note and deed of trust:

“It was the sale and delivery of 60 shares of stock and they became part of the general assets of the Stilson Company.”

That is true, but they became part of the assets only because we allowed title thereto to pass in consideration of the receipt of the secured note. It was, therefore, a sale made in consideration of the execution and delivery of the note and deed of trust. Once it is appreciated, as we trust we have now made clear, that up to the time of the execution and acceptance of the secured note title to the stock remained in the Staats Company, and it had a right to retake it, then it seems to us that it follows necessarily that the transaction did not, and could not, constitute a preference.

We regret the necessity of having thus extended this petition for rehearing. We have felt, however, that we must have failed to make clear the true situation in our original brief, and that it was only fair to the court, as well as to our clients, to endeavor to the best of our ability to make it clear in this petition. In closing we wish to call the attention of the court to this fact, that the decision heretofore rendered by the court practically confirms the fraud of Stilson. He endeavored fraudulently, by giving a bad check in what was a cash transaction, to secure the stock without paying for it. If the decision heretofore rendered is allowed to stand that very situation is brought about and confirmed. That this would be most unjust and inequitable must be obvious. That the law does not require it has, we trust, been shown in this petition. Indeed, we feel, with all due respect, that it can fairly be asserted that under the principles we have endeavored to elucidate the law requires exactly the opposite ruling. We, therefore, submit and urge most respectfully, but most earnestly, that this petition for rehearing should be granted, and that the judgment of the learned District Court should be affirmed.

We annex hereto a copy of the opinion originally rendered by this court.

Respectfully submitted,

O'MELVENY, STEVENS & MILLIKIN,

WALTER K. TULLER,

Attorneys for Appellees.

CERTIFICATE OF COUNSEL.

The undersigned, attorneys of this court and counsel for appellees in the above cause, hereby certify that in the judgment of them and each of them the foregoing petition for rehearing is well founded and further certify that the same is not interposed for delay.

HENRY W. O'MELVENY.

E. E. MILLIKIN.

H. J. STEVENS.

WALTER K. TULLER.

APPENDIX.

United States Circuit Court of Appeals for the Ninth Circuit.

Security Trust & Savings Bank, a corporation, as trustee in bankruptcy of Fielding J. Stilson Company, a corporation, bankrupt, appellant, vs. Wm. R. Staats Company, a corporation, and Title Insurance & Trust Company, a corporation, appellees.

In equity. No. 2691.

OPINION, UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Upon appeal from the United States District Court for the Southern District of California.

This is a suit in equity between the Security Trust & Savings bank, a corporation, trustee in bankruptcy of the estate of Fielding J. Stilson Company, a bankrupt corporation, and William R. Staats Company and Title Insurance & Trust Company, corporations.

The complaint alleges: That upon July 2, 1912, petition in involuntary bankruptcy was filed against the Stilson Company, and on October 24, 1912, the Stilson Company was adjudged a bankrupt; that on March 12, 1912, the Staats Company was a general unsecured creditor of the Stilson Company for \$3,870; that the Stilson Company was then insolvent, and the Staats Company knew, and had reasonable cause to believe, that the Stilson Company was insolvent; that on March 19, 1912, the Stilson Company made and delivered to the Title Insurance & Trust Company a deed of trust for certain realty in Los Angeles, which was recorded on March 20, 1912, and was received as security for the indebtedness of \$3,870 due by the Stilson Company to the Staats Company; and it is alleged that the effect of the conveyance was to enable the Staats Company to

receive a greater percentage of its indebtedness than any other creditors of the same class, and that the conveyance was made by the Stilson Company to give the Staats Company a preference in violation of the bankrupt statutes.

The trustee prays that the conveyance be vacated and declared void and that it be decreed that neither the Staats Company nor the Title Insurance Company has any right to the property described in the conveyance.

The Staats Company and the Title Insurance & Trust Company, by answer, admitted the execution and delivery of the conveyance, but denied that it operated as a preference, and set up that the Staats Company was a creditor of the Stilson Company and that the deed of trust was made under these circumstances: That on the 19th of March, 1912, and for months before then, the Stilson Company and the Staats Company were stock brokers in Los Angeles; that on March 15, 1912, the Stilson Company asked the Staats Company to sell it for cash certain shares in the Amalgamated Oil Company at \$64.50 per share, and that the Staats Company sold to the Stilson Company 60 shares at \$64.50, and delivered the certificates of stock to the Stilson Company with an understanding and agreement between the Stilson Company and the Staats Company that the sale was made for cash; that the Stilson Company then delivered to the Staats Company its check on a bank in Los Angeles in payment for the stock, and that in due course the Staats Company presented the check, but was notified that the Stilson Company had no funds wherewith to pay the check, and that it had not had funds wherewith to pay the check when the same was drawn, and that payment was refused; that the Staats Company notified the Stilson

Company of the refusal of the bank to pay the check, but that the Stilson Company assured the Staats Company that the Stilson Company was sound, but that certain funds which it had expected to receive had been slightly delayed in receipt, and that, for that reason, there were not funds on deposit sufficient to pay the check; that the Stilson Company then agreed that if the Staats Company would not exercise its right to rescind the sale, the Stilson Company would execute to the Staats Company its note for \$3,870, and to secure the note would make a deed of trust on the property described in the deed of trust heretofore referred to; that in pursuance of such agreement, the Staats Company refrained from exercising its right to rescind the sale, and accepted from the Stilson Company its note for \$3,870, and the deed of trust referred to. Good faith on the part of the Staats Company is pleaded, and it is averred that a present fair consideration passed from the Staats Company to the Stilson Company for the deed of trust.

Over the objections of the defendants below (the Staats Company and the Title Insurance & Trust Company), the matter was referred to a special master to hear the issues raised by the complaint and the answer and to report the same to the District Court together with findings of fact and conclusions of law. Thereafter the special master made his findings to the effect that on March 19, 1912, the Stilson Company was insolvent; that the transfer made by the Stilson Company to the Title Insurance & Trust Company was made and received as security for an indebtedness of \$3,870 then due by the Stilson Company to the Staats Company, and that the effect of the transfer was to enable the Staats Company to obtain a greater percentage of its claim against the bankrupt than other

creditors of the bankrupt of the same class, and that the Staats Company, when it received the transfer, had reasonable cause to believe that it was intended by the giving of the transfer to give a preference, and that the transfer was voidable at the instance of the trustee.

The Staats Company and the Title Insurance & Trust Company, defendants below, filed exceptions to the findings and report of the special master. The District Court, after overruling several exceptions and sustaining others, dismissed the complaint. From the judgment of dismissal the Security Trust & Savings Bank, as trustee of the Stilson Company, bankrupt, appeals.

Before Gilbert, Ross, and Hunt, circuit judges.

Hunt, circuit judge, after stating the facts:

The appellant contends that the court erred in sustaining the exceptions of the defendants:

To the finding of the special master that the deed of trust operated to enable the Staats Company to obtain a preference;

To the finding that the deed of trust was executed to secure an antecedent debt, and that the transaction between the Stilson Company, bankrupt, and the Staats Company, was not a single transaction;

To the finding that the 60 shares of stock had been hypothecated by the bankrupt prior to the execution of the trust deed; and

To the finding that the Staats Company, at the time of the execution of the deed of trust, had reasonable cause to believe that a preference was intended.

The history of the transaction involved, as gathered from the evidence, is in accord with the findings of the special master, and may be briefly stated as follows:

The Stilson Company was adjudged a bankrupt on October 24, 1912, upon an involuntary petition filed on

July 2, 1912. The particular act which was made the basis of the adjudication in bankruptcy was that about March 14, 1912, while the Stilson Company was insolvent, it conveyed certain of its real property in Los Angeles to the William R. Staats Company with intent to hinder and delay the creditors of the Stilson Company, and with intent to prefer the Staats Company over other creditors of the bankrupt. In due course of proceedings in the bankruptcy court it was there found that on March 15, 1912, the Stilson Company was indebted in the sum of more than \$250,000, and that it had at that time assets of no greater value than \$215,000; and that on the 19th of March, when insolvent, the Stilson Company had conveyed the realty heretofore referred to to the Staats Company, then a creditor of the Stilson Company, with intent to prefer the Staats Company over its other creditors; and that the effect of the transfer was to enable the Staats Company to receive payment of a greater percentage of its debt than any other unsecured creditor of the bankrupt.

In the present suit it was found by the special master, and the evidence well sustains the finding, that on March 15, 1912, the Stilson Company, in due course of business, bought from the Staats Company 200 shares of Amalgamated Oil Company stock at \$64.50 per share. The Staats Company delivered certificates representing 60 shares, and gave a broker's due bill for 140 shares for subsequent delivery. On that day, March 15th, the bankrupt, to pay for the shares, gave its check for \$12,900 to the Staats Company, payable at the Citizens' National Bank of Los Angeles, but on presentation of the check to the bank it was rejected for want of funds and was returned. On March 16th, Mr. Jardine, vice-president of the Staats Company, had

a talk with Mr. F. J. Stilson, president of the Stilson Company, concerning the rejected check, and was told by Stilson that the check would be made good, and Stilson asked that it be put through the bank again. On Monday, March the 18th, the check was again presented at the bank, but rejected; and thereafter, again, on the 18th of March, Stilson, of the Stilson Company, asked an officer of the Staats Company to put it through the bank once more; but again it was rejected by the bank for want of funds to the credit of the Stilson Company. Thereupon, at a conference between Mr. Jardine, of the Staats Company, and Mr. Stilson, of the Stilson Company, Stilson said he expected payment of \$10,000 upon some real estate and that he would first take care of the "item" with the Staats Company; but on the 19th of March, Stilson advised the Staats Company that he could not meet the payment, as the expected funds did not materialize, but that the Stilson Company had some realty in Los Angeles and would give the Stilson Company's equities as security. An employee of the Staats Company then went with Stilson to examine the real property offered as security, with the result that the real estate was accepted as security, and a trust deed was given by the Stilson Company on the afternoon of the 19th to the Title Insurance & Trust Company for the benefit of the Staats Company to secure a promissory note due one day after date in the sum of \$3,870, the price of the 60 shares of stock of the Amalgamated Oil Company which had been delivered by the Staats Company to the Stilson Company. On March 20th, at 9 o'clock, this deed of trust was put on record, and on that same morning the Stilson Company suspended, and thereafter did no business.

The evidence also sustains the finding to the effect

that the due bill for the 140 shares which had been given by the Staats Company to the Stilson Company, and the 60 shares also, had been hypothecated by the Stilson Company, and there is no evidence to show that when the Staats Company agreed to give the Stilson Company time to obtain the money wherewith to meet its obligations, there was any suggestion of holding onto the stock which the Staats Company had sold to the Stilson Company. The Staats Company, with full knowledge of the rejection of the check, and without any then apparent thought of retaining a lien on the shares, expressly agreed with the Stilson Company to wait and again to put the check through the bank, and did so twice after it had first been rejected.

We agree with the special master in holding that when the Staats Company accepted the mortgage it was in lieu of cash, and that the transaction became one where the debtor, to secure an existing antecedent debt due by it to the creditor, gave security, and the creditor, confirming the sale, accepted the security. We do not think that the transaction can be looked upon as a new and present advancement to the Stilson Company: it was a sale and delivery of the 60 shares of stock, and they became part of the general assets of the Stilson Company.

The evidence shows that the effect of the enforcement of the mortgage given by the Stilson Company when insolvent would be to give to the defendant the Staats Company a greater percentage of its claim against the bankrupt than other creditors of the same class, and under the facts the bankrupt must be held to have given a preference by the giving of such security to the Staats Company.

Our further view is that the evidence sustains the finding of the special master to the effect that when

the Staats Company received the trust deed from the Stilson Company it had reasonable cause to believe that it was intended to give a preference. There is ample evidence to show that the Staats Company must have known of the financial stress of the Stilson Company. Its officers knew when the mortgage was given that the Stilson Company then had checks outstanding, but rejected, and that the intent of the Stilson Company was to secure the Staats Company for the price of the 60 shares, it being in evidence that the Staats Company only wanted security for the 60 shares and did not recognize the due bill for 140 shares. We must affirm the view of the special master in his conclusions that all the circumstances surrounding the transaction must have caused the Staats Company to believe that the Stilson Company was insolvent and that the effect of the mortgage would be to prefer the Staats Company; and we hold that the master was correct in finding that it was intended that the transaction should operate as a preference. *Sundheim v. Ridge Avenue Bank*, 138 Fed. 951; *In re Dorr*, 196 Fed. 292; *Hotchkiss v. National City Bank*, 201 Fed. 664, 231 U. S. 50.

Finally, we believe that the Staats Company became a general creditor of the bankrupt and that the transaction was broken in its continuity when the Staats Company agreed to wait for its money and to send the check through the bank the second and third time, and when it agreed to wait to see whether the bankrupt would obtain money which its agents said was expected from the sale of certain other property, no effort having been made by the Staats Company to prevent the shares of stock which had been sold and delivered to the Stilson Company from passing out of the hands of the Stilson Company. That part of the argument made by the appellee in support of the action

of the District Court wherein the point is made that the giving of the check by the Stilson Company was a representation that that corporation had sufficient funds to meet the check, and that, such representation not being true, a fraud was perpetrated on the Staats Company, and that title remained in the Staats Company and did not pass until the note and deed of trust were accepted, has received our careful consideration. But whatever right of rescission existed because of misrepresentation by the Stilson Company in giving the check, was abandoned by the position taken when security was accepted for the purchase money. *Joslin v. Cowee*, 52 N. Y. 90; *Amer v. Hightower*, 70 Cal. 440; *Wendling Lumber Company v. Glenwood Lumber Company*, 153 Cal. 411.

The order of the District Court sustaining the exceptions to the report of the special master and dismissing the bill is reversed, and the cause is remanded with directions to overrule the exceptions to the report of the master and to enter a judgment in favor of the complainant.

(Endorsed): Opinion. Filed May 8, 1916. F. D. Monckton, clerk.

A true copy.

Attest, May 10, 1916.

(Seal)

F. D. MONCKTON, *Clerk*.

By PAUL P. O'BRIEN, *Deputy Clerk*.

NO. 2695

In the United States
Circuit Court of Appeals

For the Ninth Circuit

JOHN MacAULAY,

Plaintiff in Error.

vs.

ALASKA GASTINEAU MINING CO.,
A CORPORATION,

Defendant in Error.

Brief for the Plaintiff in Error

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE
DISTRICT OF ALASKA, DIVISION
NUMBER 1.

Filed

J. H. COBB, FEB 21 1910

Attorney For Plaintiff in Error.

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In the United States
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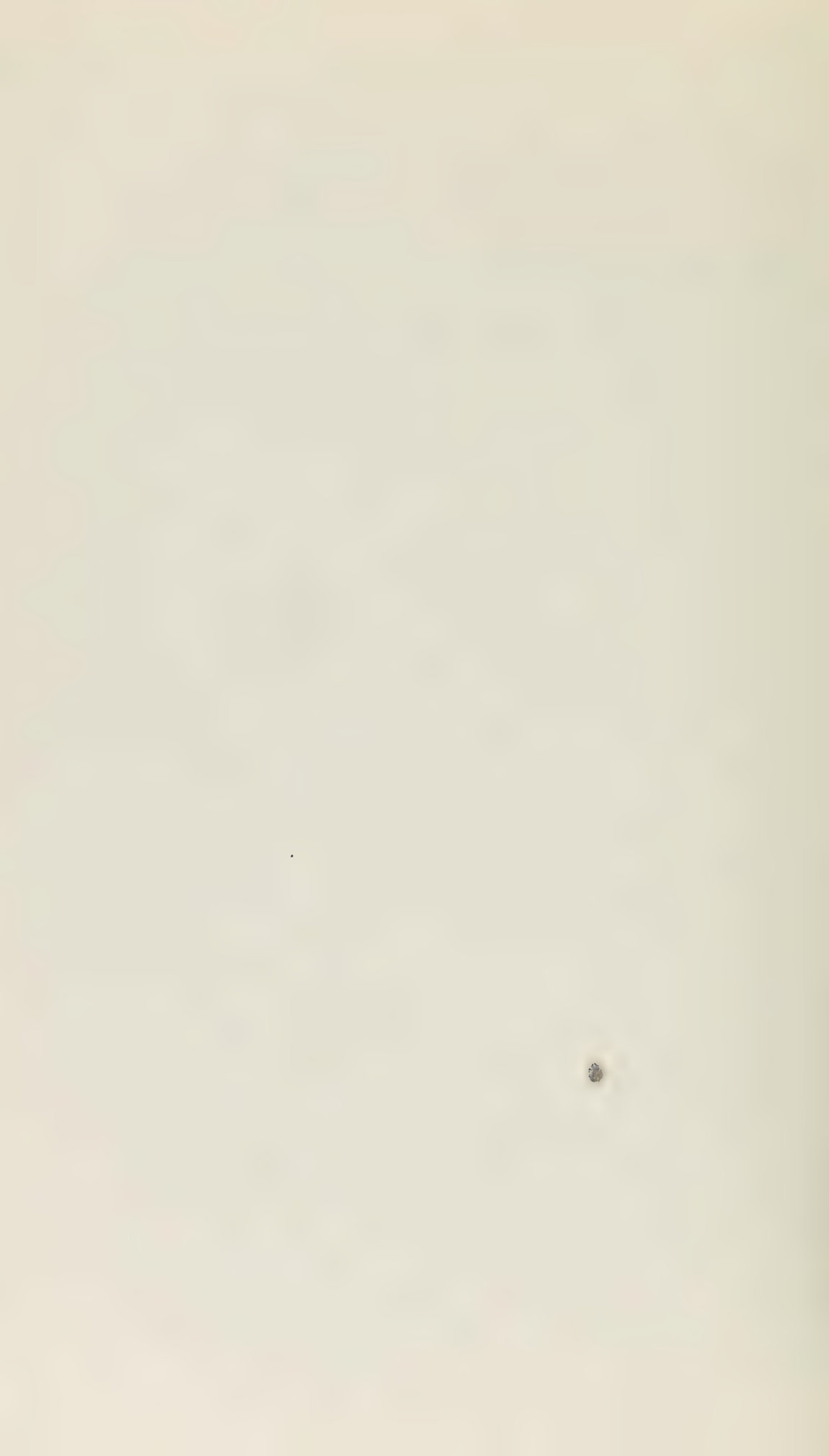
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Brief for the Plaintiff in Error

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE
DISTRICT OF ALASKA, DIVISION
NUMBER 1.

J. H. COBB,

Attorney For Plaintiff in Error.



STATEMENT OF THE CASE

This is an action for personal injuries brought by the Plaintiff in Error against the Defendant in Error. The plaintiff was an employee of the defendant at work at the time of the accident complained of in its underground mines near Juneau, Alaska. The accident occurred on the 13th day of March, 1914. About an hour prior to the accident the plaintiff was directed by the defendant to proceed to the foot of an upraise then being driven from the No. 10 level and assist some other employees there in taking some ladders into the upraise. The plaintiff had never been at this particular place before and knew nothing of the conditions there. He had been at work approximately an hour when a large rock fell down from the upraise, broke his leg and seriously injured him.

The negligence alleged was that the defendant unknown to the plaintiff had a force of men at work blasting in the workings above said raise only a short time before the plaintiff was put to work therein and that the defendant, its servants and employees, negligently failed to properly bar down and remove the rock loosened by the blasting so that there would

be no falling of rock down said raise where the men were put to work, and that the defendant, its servants and employees, failed and neglected to make the place safe against loose rock liable to come down and injure the employees where plaintiff was put to work before directing the plaintiff to work therein, and the defendant, its servants and employees was negligent in failing to bar down the rock and in failing to see that said place was safe against falling and loosened rock from the workings above before directing the plaintiff to go to work at that place.

The defenses plead, were, first; denials; second; that the accident and injury to plaintiff was one of the usual, ordinary, and assumed risks of his employment; third; a release, compromise, and settlement of the damages claimed.

At the conclusion of the testimony the case was taken from the jury and a verdict instructed for the defendant as follows: "When an employee sues an employer for damages caused by alleged negligence, he must show that the employer is negligent and be able to put his finger on the point where the employer was negligent. Unless he does show that, it is the law that he cannot recover. In other words, the mere fact that a man is hurt in a mine or anywhere else, except in certain special cases, is not proof that the person who employed him injured him by his negligence; and in this case the court will instruct you as a matter of law that there has not been proof of

negligence of the defendant, and it is therefore your duty to return a verdict in favor of the defendant."

To this ruling of the Court the plaintiff excepted. A verdict was accordingly returned for the defendant.

The sole error assigned and presented upon this record is as follows: "The Court erred in instructing the jury to return a verdict for the defendant at the end of the testimony."

The testimony for the plaintiff tended to prove the following facts:

The defendant, among other mining operations, was having an upraise driven from the No. 10 level. On the day of the accident the upraise had progressed to a point from 60 to 75 feet above the level. The method of conducting the work was as follows: About 50 feet below the face or upper end of the upraise an intermediate drift was cut in the side of the upraise in which ladders, tools etc., were kept for the use of the men at work therein. Two shifts were at work on the upraise. The last work done by each shift was to blast in the face of the upraise. Each blast broke down from 5 to 7 feet of rock,—that is, advanced the upraise that much. The effect of the blast was to leave the upper end of the upraise in an exceedingly dangerous condition from loose and shattered rock caused by the blast and the first duty of the machine man on the next shift was to go up into the upraise on ladders prepared and furnished for that purpose and bar down this loose rock

so as to make the place safe. On the day of the accident blasting was had in the face of the upraise as usual by the day shift. When the night shift came on they attempted to bar down the loose rock in the upraise but because of an insufficient supply of ladders they were unable to reach within 10 or 15 feet of the upper end of the upraise, and this portion was not barred down..

The plaintiff had never before this particular day been at work in said upraise and knew nothing of the conditions there, but was working in another part of the mine, on the night shift. He had been at work about an hour on this day when he was ordered by the mine foreman to proceed to this upraise in the No. 10 level and assist the men there in getting more ladders into the upraise. In obedience to these instructions he went to the upraise and ascended by the man-way to the intermediate drift. At this point a bulkhead had been constructed in the upraise, which bulkhead was covered with loose and broken rock from the last blast and the rock that had been barred down in the lower part of the upraise above, and the plaintiff was directed to remove this muck or broken rock preparatory to hoisting the ladders. While engaged in this work, a piece of broken rock fell down the upraise and broke his leg, seriously injuring him.

The evidence of Otie Wilcox and P. J. Poletti showed clearly the method in which the work was carried on, that it was their duty to bar down the

loose rock to make the place safe immediately upon coming on shift; that they came on shift about an hour before the accident and attempted to perform this duty but were unable to bar down the last 10 or 15 feet of the upper end of the upraise because there were not sufficient ladders on hand and they could not reach that portion of the upraise. The plaintiff testified that he had never before been at this particular place and knew nothing of the conditions there when he was ordered to go to work at the point where he was injured.

There was no serious conflict in the evidence as to the above facts, but none of the witnesses knew just what part of the upraise the rock that struck the plaintiff fell from, whether it was from the part that had been barred down by Wilcox and Poletti or from that portion of the upraise which had not been barred down or made safe.

Mr. Wilcox was also called as a witness for the defense and testified among other things as follows:

“When first going on shift the first thing we were supposed to do was to bar down to make it safe, cleaning the ladders as we went up. After blasting muck and rock lodged among the ladder rungs. These ladders are close to the foot wall and muck and rock would lodge on the rungs; we would clean them off as we went along—worked our way up to the top of the ladder, barring down anything we saw that

was loose; then we would put up our stulls—usually use 4x6's.

Q. Where did you put those?

A. In the ends of the raise, we cut hitches—what we call hitches—and use wedges—wedge one or both ends to make them tight and solid; then we use 2" plank, 2 x 12——

Q. About how far below the top of the raise did they put those stulls?

A. 6 or 7 feet ordinarily.

Q. And does the ladder have to go up that far, or when do you put the ladders up that far?

A. Well, yes; we put in this staging for machines.

Q. And then from this staging you start clearing off the face, or do you drill the holes?

A. We drill the holes—that is we get our machines and start to drill holes and when we get through drilling we blast.

Q. When you get through drilling, what do you do?

A. Put away our tools—put them where they won't be damaged by rock any at least,—at least we put them in as safe a place as we have; put machines away where they won't be broken; then cut fuse. Quite frequently, if conditions are such that we can, we take away the 2" plank, if not— —

Q. And you usually do that do you?

A. Yes.

Q. Mr. Wilcox, just one question—Is it neces-

sary to have those ladders clear up to those stulls in order to be on there and do your drilling—to put up that staging you stand on?

A. Is it necessary?

Q. The ladders have to go to these stulls in order to get in a staging and go ahead with the work?

A. The ordinary way of doing it.”

The witness further explained that the ladders have to go up to the stulls in order to get on them to do the drilling and that after the blasting is done from 5 to 7 feet of rock is broken down, and the witness further testified that the method of driving the upraise was in a miner-like ordinary way. On cross-examination the witness stated that they were taking up four ladders that day, that they were going to use only one as a means to bar down the upraise, that that was all that was necessary to reach the face of the upraise, so that they could bar it down, and that the others would be stored in the intermediate drift for use as the upraise progressed and that it was the lack of these ladders that made it necessary to do the work in which MacAulay was engaged before barring down and making the upraise safe.

Fred Riddel, a shift boss, testified for the defense that he gave the orders for MacAulay, the plaintiff, to proceed and go to work at the point where he was injured and assist in getting ladders up; that he was not present at the time of the accident but went up as soon as he heard of it a few moments thereafter. This witness testified also that

the upraise was being driven in a miner-like way, the ordinary method of performing such work.

Mr. George T. Jackson, the superintendent of the mine was also called and testified as an expert that the upraise was done in a miner-like and careful manner.

Similar testimony as an expert was given by B. L. Neiding, James Joyce and B. L. Thane.

“And the above and foregoing is all the evidence introduced on the trial bearing upon the question of negligence.”

ARGUMENT.

The statutory law applicable to this action is found in Chapter 45, Session laws of Alaska, 1913, which provides:

“Section I. That every person, association, or corporation engaged in the business of * * * * * mining * * * * * by means of machinery or mechanical appliances, shall be liable to any of its employees * * * * * for all damages which may result from the negligence of any of its or his or their officers, agents or employees or by reason of any defect or insufficiency due to its or their negligence in the machinery, appliances, or works.”

Section II. provides that contributory negligence shall not bar recovery and “all questions of negligence and contributory negligence shall be for the jury.”

This statute is a substantial re-enactment of the Federal Employes' Liability Act of 1906, under

which it is immaterial whether the negligence which resulted in the plaintiff's injury was the negligence of the defendant or of any of its employees. But this question perhaps is not involved in the case, because the ruling of the court complained of is that there was no negligence shown by the evidence at all. It is this question then which we propose to briefly examine in the light of the authorities.

The witnesses all agree that the first thing to be done after a blast in the face of the upraise, was to bar down the rock loosened by the blast and left in the upraise in such an unstable condition that it is likely to fall at any time. This is the duty of the machine men, who are supposed to be skilled in that sort of work and are the only ones whose duties require them to assume that risk prior to the time the upraise is made reasonably safe by having this loose rock barred down. On the day of the accident, Poletti and Wilcox, the machine men, attempted to perform this duty, but were unable to reach the last 10 or 15 feet of the upraise because of want of ladders. The defendant, through its shift boss, directed the plaintiff then to go to work beneath this upraise in its unsafe condition, a condition of which the plaintiff knew nothing. It would seem that no argument was needed further than this statement of the facts which the testimony tended so strongly to prove. But it was argued before the Trial Court on the motion for a directed verdict (though the record does not show it, but we presume it will be urged

here) that because none of the witnesses knew what part of the upraise the rock that injured the plaintiff fell from, there was therefore no evidence to connect the negligence alleged and proved with the accident that caused the injury, and this was really the point upon which the Court based its ruling in directing the verdict. But in answer to this it is only necessary to say that the great probabilities, and this was a question for the jury, was that the rock came from the upper end of the upraise which had not been barred down, because the evidence showed that that was what was probable, and where it had been barred down there was no such probability of a rock falling. Of course in the nature of things there could be no direct evidence as to where the rock came from; but the jury had a right to infer from the fact that the rock did come down, that that was probably what would happen where the loose rock had not been barred down, and from the force with which it must have fallen to have done the damage it did, that it must have come from the upper end of the raise which had not been barred down. In short, the Court was of the opinion that the jury in this case were not at liberty to infer from the facts proved that the rock that injured the plaintiff fell from that part of the upraise that had been left unbarred because of the shortage of ladders, and that there was no causal connection shown between the negligence alleged and proved and the injury.

Said the Supreme Court of Utah in a case some-

what like the one at bar:

“Whenever it is a defendant’s duty to keep premises in a proper condition as it respects persons passing, and these are out of condition and an accident happens, it is incumbent upon the defendant to show that he used that reasonable care and diligence which he was bound to use; and the absence of that care may fairly be presumed from the fact that there was the defect from which the accident had arisen.” *Cunningham vs. U. P. Ry. Co.*, 7 Pac. 297.

That there was negligence in failing to have the upraise barred down and made safe or reasonably safe before putting the plaintiff to work at the place where he was injured and that this general negligence or failure of duty was due directly to the negligence in failing to have the ladders on hand, goes without saying almost—at least it was not disputed on the hearing in the Court below by the learned counsel for the defendant, but the point was urged and sustained that there was no connection between the negligence proved and the injury to the plaintiff because there was no testimony as to where the rock which struck the plaintiff came from, whether from that part of the upraise that had been barred down or from the part which had not been barred down.

We submit that this was manifest error, for a jury might have inferred, and would have been reasonably justified in inferring, that the rock fell from that part of the upraise which had not been barred

down,, and as bearing upon the question of inference of fact from facts proved which juries may draw, we call the attention of the court to a few cases.

The case of the Railway Company vs Jones, 192 Fed., beginning at Page 769, was an action for wrongful death; and turned upon the question as to whether or not the plaintiff's intestate, who was killed in a railway tunnel, was struck by a portion of the tunnel which was 15 inches lower than it was at other points, and which was the negligence alleged, or whether he was killed in some undisclosed manner which would leave the company not liable. The intestate for whose death the action was brought, was a brakeman and was on the top of the train when it entered the tunnel. The next day his body was found about 200 feet north of tunnel 24 on the east side of the track and about 2 feet from the ends of the ties. There was a large gash over his right eye extending along the side of his head. Signs of blood were found on a piece of wood lying in the middle and on the east side of tunnel 23 and also from the south end of that tunnel along the east side of the track to a point near the mouth of tunnel 24. Regarding this evidence Judge Warrington said: "The rational inference is that Winters' head struck the interior low portion of the tunnel roof. The first appearance of blood was discovered on the stick of wood found on the east side of the track at that place, and the fact that no sign of blood was found between that point and the end of the tunnel reasonably tend-

ed to show that the blood found on the stick of wood came from a spurt of blood caused by the stroke and that the rest trickled over the roof and finally fell to the ground as the car passed out of the tunnel."

Louisville & N. R. Co. vs. Bell, 206 Fed. 395, was an action for damages for wrongfully destroying the plaintiff's tobacco factory by fire. There was no proof directly as to how the fire which burned the plaintiff's tobacco factory originated, whether by escaping from engines of the defendant as alleged, or by some other undisclosed means, and the case turned upon whether the jury were warranted in inferring from the facts proved that it was caused by the defendant's engines. "No one saw the spark enter the window and no one saw the kindling and first moments of the flames. Plaintiff depends wholly upon circumstantial evidence. This Court has considered that two things are essential to plaintiff's right to recovery: First, that the fire was set by such a spark; and; second: That the spark escaped through defendant's negligence * * * * * Upon the first subject—whether the fire was set by a spark from the engine—plaintiff's evidence fairly tended to show these things in addition to those already stated; before any alarm had been given and while all other parts of the factory were free from smoke, several people noticed smoke coming from the window and from the roof just above it, then looking through the window they saw a small flame in the hanging tobacco just inside the window. There was

not then, and there had not been, any fire maintained in that room or in any part of the building from which smoke could have reached this point, and it was upon the side towards the wind. The fire occurred immediately after the noon hour, while most of the hands were busy. Employees had been, not long before, in the room in question, and there was then no fire there, and no one had entered the room after that time. The wind was blowing 30 miles an hour from the track towards the factory. An engine and freight train passed going up grade and laboring hard, just before the fire; the interval between the passing of the engine and the first observation of the fire being variously stated at from 5 to 15 minutes. As the engine passed a shower of cinders was heard to fall upon the roof of a wing of the factory which roof on the slope towards the witness was from 100 to 200 feet from the track. A pedestrian on the adjacent highway, who was waiting for this train to pass, at a distance from the track which he is unable to state and which from his testimony might have been anywhere from 75 to 150 feet (he thinks it was this maximum) and he was in the line between the engine and the factory, observed the laboring engine and heavy smoke and that a shower of cinders fell on him and that some of them were alive so that they burned his hat." The other facts stated was that the factory was about 225 feet from the track. The upper story was full of high grade tobacco hanging in frames and very combustible.

All the windows were open or removed. From these facts the inference was made by the jury that the fire was caused by the engine and the Court among other things said: "We have recently had occasion to examine and re-affirm the rule that while merely from equally balanced uncertainties the jury may not infer defendant's causal relation to plaintiff's injury, yet plaintiff's evidence need not exclude every other possible source of injury; it is enough if the inference of defendant's liability is fairly and reasonably probable and distinctly more probable than other suggested explanations."

So in the case at bar we may reasonably ask what would the average man of ordinary common sense and experience have said was the cause of the rock falling from the upraise, or what would he have said as to the place from which it came? Was there an equal balancing of probabilities that it came from that portion of the upraise that had been barred down prior to the accident, or from that part that had not been barred down? In short, would the jury under the evidence, have been justified in inferring that the rock fell from the upper end of the upraise which had not been barred down and that if it had been barred down the accident would not have happened?

We respectfully submit that the evidence in this case proves negligence on the part of the defendant in failing to bar down the upraise before putting the plaintiff to work beneath where he was injured by

the falling rock; that the jury would have been justified in drawing the inference that the rock fell from that portion of the upraise which had not been barred down and was proximately due to the negligence of the defendant in the first instance. We respectfully submit that the case should be reversed and remanded with instructions to grant a new trial.

J. H. COBB,
Attorney for Plaintiff in Error.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN MACAULAY,

Plaintiff in Error,

VS.

ALASKA GASTINEAU MINING Co.

(a corporation),

Defendant in Error.

Upon Writ of Error to the United States District Court of the
District of Alaska, Division Number 1.

BRIEF FOR DEFENDANT IN ERROR.

SHACKLEFORD & BAYLESS,

Z. R. CHENEY,

Attorneys for Defendant in Error.

RUFUS THAYER,

Of Counsel.

Filed this.....day of March, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2695

IN THE

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Defendant in Error.

Upon Writ of Error to the United States District Court of the
District of Alaska, Division Number 1.

BRIEF FOR DEFENDANT IN ERROR.

Statement of the Case.

Defendant in error is the owner and operator of the Perseverance mine near Juneau, Alaska. At the time the accident complained of occurred, defendant was driving an upraise along the foot wall of the vein from the tenth level of said mine towards the ninth level, at right angles to the level, but at an incline of approximately 65 degrees to the horizontal plane of the levels. This raise had

then been driven approximately 90 feet from the tenth towards the ninth level. At about 50 feet up the raise there existed a short drift 30 feet long, referred to in the record as the intermediate drift, connecting the raise with an old stope, and continuing a short distance beyond the raise on the side opposite the stope. It had nothing to do with the prosecution of the raise, but was driven for ventilating that part of the mine, and being convenient was sometimes, though not always, used as a station by the miners prosecuting the raise. Between the intermediate drift and the tenth level the raise was divided into two compartments, a manway and an ore chute, a bulkhead in the floor of the intermediate drift covering the manway compartment. The raise at that time extended approximately 40 feet up beyond the intermediate drift, and was being driven by a day and a night shift. It was the custom for a shift to blast its round of shots in the top of the raise just before it ceased work, and for the oncoming shift to first bar down and clear the raise of the rock shattered by the last previous blast. The raise was thus made safe so that the miners could then put in a temporary staging near the top upon which they set up their machine drills to drill holes for the next round of shots. In order to climb up the raise and bar down and clear it of shattered rock, and put in the temporary staging, ladders were maintained up the foot wall side of the raise,

and it was naturally necessary as the work progressed from time to time to extend these ladders.

On the evening of March 13, 1914, plaintiff, while in the employ of defendant as an underground laborer, or mucker, on the night shift, with another mucker, was directed by the shift boss to accompany him from the tenth level west to the tenth level east, to go on new work. As the three men were passing the foot of the raise, they encountered the two miners, or machine men, who were driving the raise on that shift. These miners told the shift boss they had barred down as far as the ladders extended up to within about 10 feet of the top or roof, and had come down for additional ladders to put up so that they could finish clearing the raise. The shift boss replied that he did not have much for the plaintiff and the other mucker to do, and told the miners to take them to assist in getting up the ladders. The two miners, the plaintiff and the other mucker then went up to the intermediate drift and consumed about an hour or hour and a half in shoveling the loose rock which had fallen down from the previous blasts off of the bulkhead into the ore chute, removing the bulkhead preparatory to hoisting the ladders up through the manway. While they were so engaged, from time to time loose rock and fine dirt dropped down the raise to where the men were working. After the bulkhead was removed two of the men went down the manway

to attach a cable to the ladders, by which the plaintiff and the other man, a machine man, remaining in the intermediate drift were to hoist the ladders up through the manway with a hand windlass or winch stationed in the intermediate drift midway between the raise and the stope. While the plaintiff and miner were waiting for a signal to hoist from the men below, a piece of rock a little larger than a man's fist came bouncing down the raise from side to side, glanced off, and struck the plaintiff a little above the ankle and broke his leg. Plaintiff at the time was standing within the intermediate drift and under its roof. The evidence is undisputed that the duties of a mucker include general labor, hoisting lagging, hoisting timber, hoisting ladders, putting in timbers, and generally helping and assisting underground miners in any manner they may be directed. The evidence therefore shows that the plaintiff at the time he was injured was engaged in assisting the miners to make safe the place where the work was being prosecuted, and that the place was continually changing its character for safety as the work progressed.

At the conclusion of the testimony the Court granted defendant's motion for an instructed verdict made upon the following grounds: First, that the evidence in the case failed to show that the defendant was negligent. Second, that the evidence showed that the plaintiff assumed the risk.

Third, that any claim for damages had been fully adjusted and compromised by settlement made between the plaintiff and defendant.

Points and Authorities.

I.

DEFENDANT WAS NOT NEGLIGENT IN SUPPLYING A SAFE PLACE FOR PLAINTIFF TO WORK.

The duty of a master to supply a safe place to work does not exist (a) when the servant is engaged in a work that in itself constantly changes the place as to its character for safety. (b) When the servant is employed in making the place safe.

City of Minneapolis v. Lundin, 58 Federal 525;

Finlayson v. Utica Mining and Milling Company, 67 Federal 507;

Moon-Anchor Consolidated Gold Mines, Ltd., v. Hopkins, 111 Federal 298;

Armour v. Hahn, 111 U. S. 313;

Railway Company v. Jackson, 65 Federal 48;

Allen v. Bear Creek Coal Company, 43 Montana 269; 115 Pacific 673;

Thurman v. Pittsburg and Montana Copper Company, 41 Montana 141; 108 Pacific 588;

Bird v. Utica Gold Mining Company, 2 Cal. Appeals 674; 84 Pacific 256;

Williams Coal Company v. Cooper, 138 Kentucky 287.

II.

THE PLAINTIFF ASSUMED THE RISK BECAUSE IF ANY DANGER
 EXISTED IT WAS TEMPORARY AND AROSE FROM THE
 PROGRESS OF THE WORK.

*Davis v. Trade Dollar Consolidated Mining
 Company*, 117 Federal 122;

Ianne v. U. S. Gypsum Company, 110 N. Y. S.
 496.

III.

ALTHOUGH PLAINTIFF EXECUTED A RELEASE TO DEFENDANT
 FOR ANY CLAIM FOR PERSONAL INJURY HE FAILED TO
 PLEAD OR PROVE THAT HE RETURNED, OR OFFERED TO
 RETURN THE MONEY RECEIVED AS THE CONSIDERATION
 FOR ITS EXECUTION.

Hill v. Northern Pacific Railway Company,
 113 Federal 915.

Argument.

Plaintiff's case, as presented by his brief, rests upon the theory that if the rock which caused the injury fell from the upper part of the raise which had not been barred down, the defendant was negligent for failure to provide a safe place within which the plaintiff was to work. Defendant maintains that the doctrine of safe place does not apply to the circumstances and conditions disclosed in this case. The plaintiff's argument is based upon a statement of facts which erroneously implies, if it

does not actually represent, that he was put by defendant upon ordinary work in an unsafe place, but ignores the character of the work in which he was engaged, while the evidence clearly shows that he was engaged in assisting to make safe a place in the mine which was constantly changing as the work of driving the raise advanced. As the blast was exploded in the face of the raise the rock was broken or shattered for a distance of from five to seven feet, or more, depending upon its character, and the bulk of it fell down the raise. The remaining rock which became loose from the blast but did not fall, was then barred down and cleared off the face, walls and sides, so that it would not fall on the machine men while they were putting in the temporary staging, setting up their drills and drilling the holes for the next round of shots. The ladders were necessary to enable the miners to climb up the raise to put in the staging upon which they set up their drills and upon which they stood while drilling. The ladders were essential just as were the punches which were used in barring down, and it was while the plaintiff was assisting in procuring the ladders he was injured. The raise had been cleared up as far as the men could reach from the ladders which were then there, but they did not extend quite to the top of the raise, and an additional ladder was necessary to complete the cleaning. If the work of barring down had been completed the ladders would not have been necessary and plaintiff

would not have been engaged in helping to secure them.

All work in a mine is to some extent hazardous, pieces of rock may fall from the sides and roof of workings in spite of any precautions. Even old workings presumed to be entirely safe from the possibility of falling rocks cannot be guaranteed against the fall of isolated pieces, and the employer is required and expected to guard his employees in a mine only against probable accident or accidents which might be foreseen. He is not required nor expected to provide a place safe beyond the possibility of accident nor to guarantee his employees against any possible injury. He is required to exercise only reasonable diligence in this respect.

Plaintiff's brief on page 11 states that the barring down and making safe the raise

“was the duty of the machine men who were supposed to be skilled in that sort of work, and are the only ones whose duties require them to assume that risk prior to the time the up-raise is made reasonably safe by having this loose rock barred down”.

We submit there is no evidence whatever to sustain this contention. It is likely that the dimensions of the raise would prevent more than two men standing on the ladders to do that particular work; but there is nothing to show, and it is not reasonable to believe that the machine men were the only employees who could bring ladders, or set them up in the raise. In this particular instance

ladders could not be run up through the chute compartment of the raise. The condition of the bottom of the raise at the tenth level made it impossible. Several men in addition to the machine men might have been required to get the ladders up. Who then were to be used to help if not the muckers? the very men who by the scope of their employment were to do this very thing. The evidence in uncontradicted that

“a common laborer, a mucker, is always supposed to do general work, help timber, lay track, dig ditches, any kind of work except machines, not supposed to run machines; but any assistance he can give machine men in putting up his machines, putting on the power, laying track, that is a part of his work. They help the machine men to put up ladders”. (Bill of Exceptions, page 74.)

“A common laborer underground in a mine is supposed to help on most anything around the mine, to help machine men at most anything they want to do if they need help; to aid and assist in raising ladders in raises to be used in barring down rock from the face of the raise.” (Bill of Exceptions, pages 83-84.)

“A mucker is supposed to do everything outside of handling powder, to assist men in raising ladders.” (Bill of Exceptions, page 87.)

“A common laborer is supposed to do all of the work that a special laborer does not do. You can distinguish a common laborer from a special laborer. A special laborer is a miner who handles drills and powder, shaft man, hoist man, etc. The usual laborer around a mine has to perform all of the ordinary underground labor, commonly called a mucker. They are used to hoist lagging, hoist timbers, hoist ladders, to assist the miners who have the

direct work of drilling, blasting their holes, put in timbers, sometimes laborers are called to assist the miners in that work.” (Bill of Exceptions, page 88.)

From the portion of the brief above quoted to the effect that this work was only for the machine men, plaintiff could not logically maintain that if a machine man had been injured while engaged in barring down, the defendant would be responsible.

In the *Finlayson* case above cited, it appears that the deceased was at work in preparing a place to set a timber to make a level safe for the workmen, and was killed by the fall of a mass of rock uncovered by a blast a short time before. In that case it appeared that another miner and the foreman had noticed the mass of rock, that it was loose and might possibly fall, and they had tried to get it down, but that they did not apprehend immediate danger, and the deceased was put to work without any warning from the foreman, to cut a notch for a timber to make the place safe. The Court said:

“The complaint in this case is that the master was negligent because it did not before Finlayson commenced to timber, safely timber and make safe the place necessarily made dangerous by the progress of the work which it had employed Finlayson himself and his fellow workmen to make safe. In other words, the complaint is that the master was negligent because it did not render unnecessary the work it employed the servant to do before he commenced to do it.”

A directed verdict for the defendant was affirmed. So in the case at bar, the complaint is that the defendant was negligent because it did not bar down the rock before plaintiff was directed to assist in putting up ladders to enable the miners to bar down.

In the *Moon-Anchor* case above cited, deceased was killed by the fall of a large piece of rock from the roof of a station just outside the timbering under which he stood. This rock fell on a pile of rock formed by a cave-in outside of the timbering, and was deflected so as to glance under the timbering, and crushed the deceased, causing his death. The court held that the evidence disclosed no substantial fault or want of care on the part of the defendant, and that deceased was killed while engaged in make a place safe which was constantly changing as the work progressed.

In the case at bar the character of the raise for safety changed from hour to hour as the work progressed. As soon as the raise had been cleared of the rock shattered by the blast and completely barred down it might be considered a safe place even upon the contention of plaintiff's counsel, and as the clearing and barring down progressed the safety of the place would necessarily increase. At the time of the injury the plaintiff was standing back within the intermediate drift and under its roof, and was injured by a rock which glanced so as to strike him as it came down the raise. The conditions were similar as to those

which appear in the *Moon-Anchor* case. Under any circumstances defendant could not be expected to provide against a piece of rock being deflected so as to glance into a covered working of the mine.

In the case of *Davis v. Trade Dollar Consolidated Mining Company*, plaintiff in error was injured by drilling into an unexploded blast. This Court said:

“A master is not required to furnish a servant a safe place in which to work where the danger is temporary and when it arises from a hazard in the progress of the work itself and which is known to the servant.”

Plaintiff by his employment must be presumed to know the dangers he was risking as an underground laborer and he assumed whatever risks there were.

In the case of *Ianne v. U. S. Gypsum Company*, 126 App. Div. 244; 110 N. Y. S. 496, a common laborer in a mine who transported props to a prop setter to be used by the latter in the course of his work in propping up the roof of a mine was injured. The Court held that the laborer was engaged in assisting to make the place safe and could not recover. Reversal of this case by N. Y. Court of Appeals was entirely upon another ground.

From the foregoing decisions quoted and the decisions cited, and a multitude of others which might be cited, it is obvious that one of the machine men employed in driving the raise, could not have recovered if he had been injured under circumstances like those under which the plaintiff was

injured. In other words, if the witness Polleta, who was a machine man engaged in driving a raise, and who at the time of the accident was with the plaintiff standing close to him in the intermediate drift, and was being assisted by the plaintiff in hoisting the ladders, had been struck and injured by the piece of rock, instead of plaintiff, he assuredly could not recover against the defendant. It remains only to ascertain whether defendant is liable to plaintiff when it would not be liable to a machine man with whom plaintiff was working as mucker. No unusual hazard was apparent, the evidence shows all four men were taking the same risk, and it does not appear that any of them considered the work hazardous. While the four men were at work shovelling rock off the bulkhead, and were engaged in that work for from an hour to an hour and a half, it appears that loose rock and dirt were from time to time falling down the raise. The plaintiff himself states:

“While we were working there mucking off the bulkhead, little fine dust and stuff, little rocks, were coming down all the time.” (Bill of Exceptions, pages 49-50.)

This the plaintiff appears to have disregarded. But in any event the rock and falling dirt rattling down the raise was sufficient to put plaintiff on notice as to the character of the work in which he was engaged for at least an hour or an hour and a half prior to the injury.

Plaintiff had applied to defendant for work as an underground laborer, or mucker. Although his testimony on the stand indicates that he had little or no experience underground, it is not contended that this fact was known to defendant. On the contrary, it affirmatively appears that plaintiff represented to defendant's agent at the time of his employment that he had been employed at the Brittania and Granby Bay mines, this while he was applying for work underground. The indications are that if plaintiff had then had no underground experience he was misrepresenting the facts to the defendant, in the hope of securing employment. There is nothing to show that he disclosed his lack of experience, but he led the defendant to believe that he was experienced in the class of work for which he was applying. (Bill of Exceptions 51, 58.) Defendant was fully justified in believing and in assuming that plaintiff was an experienced mucker, that he knew the ordinary duties of an underground laborer, and of the hazards incident to that work. If plaintiff had been employed in work upon the surface, and had been sent underground to perform underground labor, or if it appeared that defendant had knowledge that plaintiff did not know what the duties of a mucker were, or if it appeared that plaintiff was sent by defendant to do work in a place where defendant had knowledge of an unusual hazard, and the plaintiff did not have such knowledge, the case might be different; but everything indicates that so far as defendant knew, plaintiff had fully as much

information of the risks he was running as did the defendant. Plaintiff not only voluntarily assumed the risk of underground work, but invited the defendant to put him upon work of the very character as that in which he was engaged at the time of the injury. It is not a question of whether or not the plaintiff was ever in a raise before or had ever worked underground, but only a question as to whether or not defendant knew that plaintiff had had no experience underground, or whether defendant had reason to believe that plaintiff was a novice in work of this character. There is no evidence whatever to show that defendant knew plaintiff had not had experience underground, and the uncontradicted evidence is that plaintiff led defendant to believe that he had had underground experience in the Britannia and Granby Bay mines.

The raise was on an incline and rock dropping from the top of the raise could not fall vertically for more than a few feet and the danger of injury under these circumstances was necessarily slight, especially when defendant was standing underneath the roof of the intermediate drift, and could only be injured by a rock from the raise if it were deflected. Such work is not considered hazardous (bill of exceptions, page 92.) If any hazard existed it was temporary and due solely to the progress of the work. The most that can be said of the injury is that it was an unfortunate accident incident to the plaintiff's employment, working within the

scope of his employment and which he risked by accepting work.

The bill of exceptions does not disclose the evidence with reference to the release; but defendant's amended answer distinctly states that defendant paid plaintiff

“\$114.00 in full satisfaction on account of said injury or injuries so sustained and referred to in plaintiff's complaint, and plaintiff did receive the said sum from the defendant, and in consideration therefor did execute and deliver to defendant his release, fully satisfying and discharging any and all claims which the plaintiff had, or might have against the defendant because of said injury or injuries.”

In plaintiff's reply to amended answer he admits that he received the sum of \$112.50 and denies that it was in consideration of a release for claims for damages, but states that he signed a slip of paper upon fraudulent representations and while under great physical pain and unable to exercise sufficient care and circumspection to protect himself from imposition. But plaintiff nowhere avers a return of the money received, nor any offer to return the money, and the absence of evidence from plaintiff's own bill of exceptions must be considered more strongly against him, and under the authority laid down by this Court in the case of

Hill v. N. P. R. C., 113 Federal, 916,
defendant contends that plaintiff has no standing in Court.

The cases cited by plaintiff are not in point.

In

Cunningham v. U. P. R. C., 7 Pacific 795,

the plaintiff was not injured while assisting to make the place safe.

Railway Company v. Jones, 182 Federal 769,
and

Louisville and N. R. Company v. Bell, 26
Federal 395,

are concerned only with the inference which may be drawn by the jury as to proximate cause. In the case at bar there can be no dispute as to the proximate cause of the accident. In the opinion of defendant it is immaterial whether the rock came from one part of the raise or another, or from the roof of the intermediate drift, or elsewhere. The plaintiff was assuming only the ordinary risks which were incident to his employment and which he foresaw, or might have foreseen by the exercise of reasonable circumspection. No one is more ready than defendant to admit the obligation of a master to provide a reasonably safe place within which the servant is to render his service; but defendant most urgently maintains that this rule should be reasonably applied, and that it does not apply to the case at bar, where the plaintiff, working within the scope of his employment is engaged in assisting to make the place of service safe.

All of which is respectfully submitted.

SHACKLEFORD & BAYLESS,
Z. R. CHENEY,

Attorneys for Defendant in Error.

RUFUS THAYER,
Of Counsel.

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NO. 2695.

In the
United States
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JOHN MAC AULAY,
Plaintiff in Error,

VS.

ALASKA GASTINEAU MINING COMPANY
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Defendant in Error.

Petition for Rehearing

Filed

SEP 1 - 1916

F. D. Monckton,
Clerk.

J. H. COBB,
Attorney for Plaintiff
in Error.

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Attorney for Plaintiff
in Error.

PETITION FOR REHEARING

We have carefully considered the opinion of the Court in this case, and belief therefrom, that the Court has overlooked certain vital and controlling elements in the case. This is not surprising because the plaintiff in error, from his poverty was unable to have the record printed, and this led to a certain want of clearness in the brief. We therefore most respectfully ask the Court for a rehearing.

The points to which reference is made and which are not alluded to at all in the opinion filed are the following:

1st. The plaintiff testified, that when he was first employed, he was put to work at another and different place in the mine; that in about an hour before the accident he was sent by the foreman, and put to work in the upraise, and knew nothing of the conditions existing, or the dangers to which he was subjected. This evidence was not contradicted. *Plaintiff therefore did not assume any of the risks of the accident by which he was injured.*

2nd. The evidence further shows without conflict, that in prosecuting the work of driving the upraise, the ladders for the use of the machine

men in going up to the face of the upraise after the blast, were kept in the intermediate drift, so that the upper part of the upraise could be barred down before there was any work done in removing the muck and thereby exposing the workman to the danger of rock falling from the unbarred drift. On this particular occasion no ladders were in the intermediate drift as they should have been. For this reason the drill men could not complete the barring down of the loose rock in the upper end of the upraise, until the muck on the bulkhead was removed and the bulkhead opened, and a further supply of ladders hoisted. It was while doing this work, which was made necessary by the negligence of the defendants or some of its agents, that the plaintiff was injured. And it is immaterial whether the negligence was the negligence of the Company or one of its servants, for the fellow-servant rule is abolished in Alaska by Chapter 45, Session laws of 1913, quoted in the brief.

We have then a case of an unusual and dangerous situation caused by the negligence either of the defendant, or those for whose negligence it was responsible; and an employee summoned from another place, and sent to where he was exposed to these dangers, without any previous knowledge of their existence, or of the conditions out of which they grew.

It may well be that even where dangerous conditions are caused by the negligence of the

master and a servant is directed to and does go to work, exposed to those conditions, and knows of the dangers, he cannot recover for an accident, for he assumes the risk. But where the danger is caused by negligence, and the servant is set to work exposed thereto, and ignorant thereof, it cannot be said that he assumes the risk. Assumption of risk rests upon the voluntary choice of the servant.

While it is true that a number of witnesses testified generally that the method of driving the upraise was in a proper miner-like way, and that the dropping of rocks is one of the incidents at times unavoidable, yet there was no evidence offered to meet the claim of plaintiff that if the ladders had been in the drift where they were usually kept, there would have been no necessity for putting him to work as was done, beneath an upraise the upper end of which had not been barred down, so as to minimize the danger from falling rock. And under the evidence it was for the jury to say whether this negligence was the proximate cause of the injury.

The case in the trial Court turned upon the question whether the evidence was sufficient to go to the jury as to where the rock came from—whether from that portion of the upraise that was barred down or that part not barred down. It was conceded that the case should go to the jury if the rock came from the portion not barred; and

the plaintiff in error briefed the case on that point. This Court has affirmed the case on the theory that plaintiff assumed the risk: Yet the accident by which he was injured was almost certainly due to the failure of the machine men to bar down the upper end of the upraise. This failure was due to failure to have the ladders in the intermediate drift. This necessitated exposing the plaintiff to the danger from falling rock from the unbarred upraises. Pursuant to orders he exposed himself to these extraordinary dangers without any knowledge of their existence.

We think that a careful reconsideration of the case will convince the Court that the case should have gone to the jury. We know that same accidents necessarily happen in all mining communities, for which no one is legally or morally liable. But where, as in this case, a dangerous condition of a mine is brought about by negligence and a servant, in ignorance of that condition, is exposed to the danger, and injured thereby, then the master should be held liable.

The evidence would have justified the jury in finding

1st. That the accident by which plaintiff was injured was caused by the failure to bar down the upper part of the upraise before plaintiff was put to work removing the muck; and

2nd. That this failure was due to the negligence in failing to have the requisite number of

ladders on hand in the intermediate drift. If this was true the plaintiff was entitled to recover.

J. H. COBB,
Attorney for Plaintiff
in Error.

I hereby certify that in my judgment the above and foregoing petition for a rehearing is well founded and is not interposed for delay.



Attorney for Plaintiff in Error.

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